1986

Carl C. Talbot v. City of St. George, a corporate sole : Brief of Appellant

Utah Supreme Court

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CASE NO. 860144-CA

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IN THE SUPREME COURT OF THE STATE OF UTAH

CARL C. TALBOT Plaintiff/ Respondent vs. CITY OF ST. GEORGE, a corporate sole, Defendant/ Appellant.	BRIEF OF APPELLANT 860144-CA CASE NO. 20840

APPEAL from a Judgment entered in the District Court, Fifth Judicial District, Washington County, State of Utah, by the Honorable J. Harlan Burns, District Court Judge.

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IN THE SUPREME COURT OF THE STATE OF UTAH

CARL C. TALBOT	)	
	)	
Plaintiff/	)	BRIEF OF APPELLANT
Respondent	)	
	)	
	)	
vs.	)	
	)	
CITY OF ST. GEORGE, a	)	CASE NO. 20840
corporate sole,	)	
	)	
Defendant/	)	
Appellant.	)	

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ISSUES FOR REVIEW

The following issues are presented for review by the Court.

1. Whether or not it was error for the trial court to deny Defendant's Motion to either continue the trial or in the alternative bifurcate the issues and hear the issue of damages at a later date.

2. Whether or not it was error for the trial court to admit evidence relating to an issue raised for the first time on the day of trial.

3. Whether or not the Defendant was entitled to additional time to prepare for and meet the new issue raised for the first time on the day of trial.

4. Whether or not it was error for the trial court to fail to give Defendant an opportunity to present a closing argument.

CONSTITUTIONAL PROVISIONS AND RULES

1. U.S. Constitution, Amendments V and XIV (Due Process Guarantees).

2. Rule 42(b), Utah Rules of Civil Procedure:

> **Separate Trials.** The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues.

3. Rule 40(b), Utah Rules of Civil Procedure:

> **Postponement of the Trial.** Upon motion of a party, the court may in its discretion, and upon such terms as may be just, including the payment of costs occasioned by such postponement, postpone a trial or proceeding upon good cause shown. If the motion is made upon the ground of the absence of evidence, such motion shall also set forth the materiality of the evidence expected to be obtained and shall show that due diligence has been used to procure it. The court may also require the party seeking the continuance to state, upon affidavit or under oath the evidence he expects to obtain, and if the adverse party thereupon admits that such evidence would be given, and that it may be considered as actually given on the trial, or offered and excluded as improper, the trial shall not be postponed upon that ground.

4. Rule 15(b), Utah Rules of Civil Procedure:

> **Amendments to Conform to the Evidence.** When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court shall grant a continuance, if necessary, to enable the objecting party to meet such evidence.

5. Rule 1(a), Utah Rules of Civil Procedure:

> **Scope of rules:** These rules shall govern the procedure in the Supreme Court, the district courts, city courts, and justice courts of the State of Utah, in all actions, suits and proceedings of a civil nature, whether cognizable at law or in equity, and in all special statutory proceedings, except as stated in Rule 81. They shall be liberally construed

to secure the just, speedy, and inexpensive determination of every action.

6. Rule 8(f), Utah Rules of Civil Procedure:

> **Construction of Pleadings.** All pleadings shall be so construed as to do substantial justice.

STATEMENT OF THE CASE

This is a personal injury case in which the Plaintiff was injured by a vehicle belonging to and operated by the Defendant, the City of St. George. Trial was held on June 13, 1985, before the Honorable J. Harlan Burns, District Judge of the Fifth Judicial District, sitting without a jury. The Court found for the Plaintiff and entered a judgment accordingly, from which judgment this appeal is taken.

The relevant facts as found by the Court below and upon which this appeal is based are as follows:

On April 5, 1983, Plaintiff hauled a load of gravel to a site in the City of St. George *(Transcript page 20).* After arriving at the site, Plaintiff waited for an agent for the City of St. George to arrive and instruct him as to where to dump the gravel. Ron Larson, an employee of St. George City, arrived and parked his pickup truck to the left of Plaintiff's vehicle, whereupon Plaintiff exited his vehicle and spoke to Larson through the passenger side window of said pickup. After a brief conversation, Larson drove the pickup forward, at which time, a pipe vise which extended a short distance from the right rear side of the pickup, struck the Plaintiff in the back, knocking him to the ground *(Transcript page 25).*

After a short time, the Plaintiff recovered and climbed into his vehicle and dumped the load of gravel as he had been instructed. Plaintiff then returned to his place of business, reported the accident to his supervisor and took the rest of the day off. Plaintiff was seen by his physician the following day *(Transcript pages 29-31),* who treated him initially and later referred him to an orthopedic surgeon for further treatment. This surgeon reported that no permanent injury was expected *(Transcript pages 90-91).*

Plaintiff continued to experience pain after the incident and eventually brought suit against the City of St. George, alleging negligence, and prayed for general damages in addition to special damages for his medical expenses. The matter proceeded to trial, which was held in District Court, Washington County, before the Honorable J. Harlan Burns, sitting without a jury, on June 13, 1985. The trial lasted for a period of one day, at which time the Court found the City of St. George negligent in operating its vehicle and that said negligence was the proximate cause of the injury to Plaintiff *(Transcript page 146).* The Court awarded Plaintiff a total of Three Thousand Three Hundred Ninety-two Dollars ($3,392) for special damages and Twenty-three Thousand Seven Hundred Forty-four Dollars ($23,744) for general damages, for a total of Twenty-seven Thousand One

Hundred Thirty-six Dollars ($27,136), plus costs in the matter. The sum of $23,744 was based upon a Finding made by the Court with respect to the Plaintiff of ten percent (10%) permanent impairment of the man as a whole. The Court took judicial notice of the life expectancy of a 45-year-old white male, 27.8 years, in calculating the damages *(Transcript page 150).*

Throughout the course of this proceeding and, in fact, until the afternoon of the day before trial, Plaintiff had never alleged any permanent disability of any sort. The issue of permanent disability was not raised at the Pretrial Conference which was held in December, 1984. The Pretrial Order, which does mention permanent disability, was not submitted to the Court until the day of trial *(Transcript page 4).* Plaintiff himself did not know until the examination was conducted on the day before trial that there was any permanent disability *(Transcript pages 84-87).* Defendant was prepared and expected to go to trial on the issue of negligence, with the issue of damages being considered a relatively undisputed aspect of the case. Defendant was surprised and therefore unable to adequately prepare a defense for the permanent disability, since none was expected and none was alleged until the date of trial.

On the day of said trial, Defendant objected to

the admission of any evidence relating to permanent disability and moved the Court grant a continuance until Defendant had a chance to conduct an examination of Plaintiff by his own experts and prepare an adequate defense for the permanent disability issue, or in the alternative, for the Court to bifurcate the issues, hear the issue of negligence at that time and reserve the issue of damages for a later date *(Transcript pages 2-4).* These Motions were taken under advisement by the Court and the trial proceeded on that day with evidence being admitted over Defendant's Objections *(Transcript pages 27, 28, 83, 84)* as to the amount of partial permanent disability and the damages incurred by reason of said disability. The Court found the Defendant negligent, Plaintiff not contributorily negligent, and that Defendant's negligence was the proximate cause of Plaintiff's injury, and judgment was entered accordingly *(Transcript page 150).*

SUMMARY OF ARGUMENTS

The following arguments will be presented by Defendant.

1. The trial court should have granted Defendant's Motion to either continue the trial or bifurcate the issues since Defendant was surprised by a new issue on the day of trial.

2. After denying Defendant's Motion as stated in Paragraph 1 above, the trial court should have excluded any evidence pertaining to the new issue.

3. The trial court abused its discretion in failing to give Defendant additional time to meet the new issue.

4. The trial court erred in failing to give Defendant an opportunity to present its closing argument in violation of due process guarantees.

ARGUMENTS

I. THE COURT'S REFUSAL TO BIFURCATE THE TRIAL AND HEAR THE ISSUE OF DAMAGES AT A LATER DATE WAS REVERSIBLE ERROR.

Rule 42(b) of the Utah Rules of Civil Procedure states:

> The Court in furtherance of convenience or to *avoid prejudice* may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any *separate issue* or of any number of claims, cross-claims, counterclaims, third-party claims, or issues. (Emphasis added.)

As this rule clearly states, the trial court has the power to bifurcate the trial and hear separate issues at a different time (Page v., Utah Home Fire Insurance Company, 391 P.2d 290, 292 [1964]; Raggenbuck v. Suhrmann, 325 P.2d 258, 259). The issue of damages is separate from the issue of negligence and could have been heard separately. The question is whether or not the Court's refusal to bifurcate the trial can constitute reversible error. Although the Court did not specifically deny Defendant's Motion to continue or bifurcate the trial, it did take said Motion under advisement and proceeded with the trial. The actions of

the Court in conducting the trial and entering a judgment immediately thereafter constitute a denial of Defendant's Motion, even though the matter was not specifically recalled nor ruled upon (Georgia Casualty Co. v. Body, C.C.A., Cal., 34 F.2d 116; Wallace v. Gilley, 12 A.2d 416, 136 Me.523).

Since the decision of whether or not to bifurcate the trial as allowed by the above-stated rule is couched in the permissive "may" rather than the mandatory "shall," the standard of review should be whether or not there was an abuse of discretion by the trial court (Bairas v. Johnson, 373 P.2d 375, 377 [1962]). The rule itself suggests the appropriate standard should be to "avoid prejudice" in deciding whether or not to bifurcate the trial. If the Defendant was indeed unfairly prejudiced by the trial Court's refusal to bifurcate the issues, such would almost certainly constitute an abuse of discretion since it is axiomatic that the trial court should always act so as to avoid prejudicing either side.

In this regard, the Utah case of Taylor v. E.M. Royle Corp., 264 P.2d 279, 280 is instructive. In that case, trial was held on a theory of express contract but judgment was entered on the basis of a quantum meruit theory which had been neither pleaded nor argued by

either side. Holding such ruling to be an abuse of discretion, the Court stated:

> It is true that our new rules should be "liberally construed" to secure a "just * * * determination of every action", but they do not represent a one-way street down which but one litigant may travel. The rules allow locomotion in both directions by all interested travelers. They allow plaintiffs considerable latitude in pleading and proof, to the point where some people have expressed the opinion that careless legal craftsmanship has been invited rather than discouraged. Be that as it may, a defendant must be extended every reasonable opportunity to prepare his case and to meet an adversary's claims. *Also he must be protected against surprise and be assured equal opportunity and facility to present and prove counter contentions,--else unilateral justice and injustice would result sufficient to raise serious doubts as to constitutional due process guarantees.* (Emphasis added).

The Court went on to reverse the judgment of the lower court in order to give the Defendant an opportunity to prepare for and contest the new theory. Although the factual situation in *Taylor* is somewhat different than the present case, the same principles should still apply. A matter raised for the first time at trial can be no more adequately prepared for by the opposing side than if the matter were never raised.

Plaintiff claims that it was not necessary to allege permanent disability at any time prior to trial

and that in addition the Defendant could have had the Plaintiff examined by his own experts prior to trial under Rule 35 of the Utah Rules of Civil Procedure. While it is true that Plaintiff was not required to plead specifics such as the exact amount of damages, it is required to plead specifically enough to give the Defendant notice of each issue it intends to raise. As the Court stated in Cheney v. Rucker, 14 Utah 2d 205, 211, 381 P.2d 86, 91 (1963):

> "What they are entitled to is notice of the issues raised and an opportunity to meet them. When this is accomplished, that is all that is required. Our rules provide for liberality to allow examination into and settlement of all issues bearing upon the controversy, but *safeguard the right of the other party to have a reasonable time to meet a new issue if he so requests."* (Emphasis added).

See also Fillmore City v. Reeve, 571 P.2d 1316, 1318; Williams v. State Farm Insurance Company, Utah, 656 P.2d, 966, 970, 971; Bown v. Loveland, 678 P.2d 292, 295 (Utah 1984); Buehner Block Company v. Glezos, 310 P.2d 517, 519; National Farmers Union Prop. & Cas. Co. v. Thompson, 286 P.2d 249, 253.

Permanent impairment is a separate issue from temporary injury, encompassing as it does compensation for damages incurred over a lifetime. Temporary injury

anticipates damages for immediate medical bills and temporary pain and suffering but no long-term effects. Plaintiff could have put Defendant on adequate notice at any time prior to trial by simply alleging permanent disability or amending his Complaint accordingly. Defendant would then have been on notice that such was to be an issue at trial and could have prepared accordingly, including the use of Rule 35 of the Utah Rules of Civil Procedure.

Defendant was instead surprised on the day of trial to be faced with an issue which he had not anticipated. Hindsight argues that Defendant should have anticipated the issue of permanent impairment and prepared accordingly. However, requiring the Defendant to anticipate each and every issue that could possibly be raised by the Plaintiff would place an intolerable burden on the Defendant, requiring him to expend great sums of time and money in defending even the simplest of cases. Our rules do not require such a result.

Rule 8 (f) of the Utah Rules of Civil Procedure states:

"All pleadings shall be so construed as to do substantial justice." (See also Rule 1(a), URCP.)

Rule 15 of the Utah Rules of Civil Procedure allows the parties to amend their pleadings even after judgment has been entered in order to conform to the evidence. However, in order to protect the other party from any trial by ambush, Rule 15 (b) requires the Court grant a continuance to the objecting party to allow him time to meet any new evidence. This was not done, although the Objection and Motion to bifurcate the trial were properly made *(Transcript pages 2-4, 27, 28, 83, 84).*

II. THE COURT ERRED IN ADMITTING EVIDENCE RELATING TO PERMANENT DISABILITY.

Since the Court refused Defendant's Motion to bifurcate the trial, the Court was under an obligation to deny admission of any evidence relating to the new issue of permanent disability for which Defendant had had no fair opportunity to prepare if such evidence were prejudicial to Defendant. The evidence concerning partial permanent disability was certainly prejudicial since nearly 90% of the award was based on said evidence (Youngren v. John W. Lloyd Construction Company, 450 P.2d 985, 986; Kaiser Aluminum & Chemical Sales, Inc. v. Lords, 460 P.2d 321, 322).

Even in cases in which the Court has refused to recognize a new or unpleaded issue as prejudicial, the

Court has relied on a lack of surprise or failure to object as indications of whether or not there was any actual prejudice (Buehner Block Co. v. Glezos, 310 P.2d 517, 520). In the instant case, Defendant both claimed surprise and objected to the introduction of any evidence relating to the new issue of permanent disability.

Since the issue of permanent disability constituted a new cause of action, it should have been required to appear as an amendment to the Complaint if evidence concerning it were to be allowed. However, an amendment offered on the day of trial is justifiably viewed with skepticism and should be closely scrutinized for any unfairness or prejudice by the trial court (Girard v. Appleby, 660 P.2d 245, 248 [Utah 1983]).

III. THE DEFENDANT WAS ENTITLED TO TIME TO CONDUCT HIS OWN INVESTIGATION INTO THE ISSUE OF PERMANENT DISABILITY:

Although the results of such an investigation may or may not have altered the result reached by the trial court, the Defendant should at least have had the opportunity to adequately prepare and argue the issue, and present evidence on its behalf (Taylor v. E.M. Royle Corp., 264 P.2d 279, 280; National Farmers Union Prop. &

Cas. Co. v. Thompson, 286 P.2d 249, 153). (Rule 40(b), URCP.)

IV. THE TRIAL COURT FAILED TO GIVE DEFENDANT AN OPPORTUNITY TO PRESENT A CLOSING ARGUMENT.

At the conclusion of Defendant's case the Court asked the Plaintiff if there was any rebuttal. Upon receiving a negative response, the Court immediately entered its findings without giving Defendant an opportunity to present its summation *(Transcript page 146).* While the Court had heard all the evidence and was certainly qualified to draw its own conclusions therefrom, Defendant was entitled to an opportunity to present its interpretations of the evidence admitted. This is especially important in view of the restriction against commenting on the evidence at any time prior to the conclusion of the lawsuit. Due Process requires that Defendant have at least an opportunity to present arguments in his behalf.

CONCLUSION

In view of the trial court's error in refusing to continue or bifurcate the trial and in allowing evidence over defendant's objection relating to permanent disability, and in failing to allow Defendant an opportunity to present a closing argument on its behalf, Defendant respectfully requests the Court reverse the ruling of the trial court and grant judgment for the Defendant or in the alternative, for the Court to reverse such part of the damage award as relates to the issue of permanent disability.

Respectfully submitted this 29th day of October, 1985.

V. Lowry Snow

David L. Watson

Attorneys for Appellant

MAILING CERTIFICATE

I do hereby certify that I mailed a true copy of the above and foregoing Appellant's Brief to Scott A. Gubler and John E. Newby, Attorneys for Respondent, 205 East Tabernacle, St. George, Utah 84770, first-class postage prepaid, on this 29th day of October, 1985.

Norma L. Christensen

Form 29. Judgment.
Form 30. Notice of Appeal to the Supreme Court.
Form 31. Petition for Order Granting Intermediate Appeal.
Form 32. Designation of Record on Appeal.
Form 33. Table of Contents of Brief on Appeal.
Form 34. Statement of Points, as Contained in the Brief.
Form 35. General Form of Brief and Contents.

PART I

Scope of Rules—One Form of Action

RULE 1

GENERAL PROVISIONS

(a) **Scope of Rules**: These rules shall govern the procedure in the Supreme Court, the district courts, city courts, and justice courts of the State of Utah, in all actions, suits and proceedings of a civil nature, whether cognizable at law or in equity, and in all special statutory proceedings, except as stated in Rule 81. They shall be liberally construed to secure the just, speedy, and inexpensive determination of every action.

Compiler's Notes.

This Rule is substantially the same as Fed. Rule 1, except that it has been adapted to procedure of the State of Utah.

Cross-References.

Application of Rules to other proceedings, Rules of Civil Procedure, Rule 81.

Children's cases deemed civil proceedings, 78-3a-44.

Jurisdiction and venue of courts unaffected by Rules, Rules of Civil Procedure, Rule 82.

Supreme Court, district courts, city courts, and justice courts, Title 78, chapters 2 to 5.

Supreme Court's rule-making power, 78-2-4.

United States, execution of process on land acquired by, 63-8-1, 63-8-3, 65-6-1.

United States, service of process on lands leased to, 65-1-56.

Construction and application.

Noncompliance with rules is allowed only when some inadvertence, surprise, excusable neglect, or mistake has occurred, and deviation is required for substantial justice to be done. Holton v. Holton, 121 U. 451, 243 P. 2d 438.

Absence of demand for attorney's fees in complaint does not preclude award of such fees by trial court. Palombi v. D & C Builders, 22 U. (2d) 297, 452 P. 2d 325.

Collateral References.

Courts⇐85.
21 C.J.S. Courts §§ 174-177.
20 Am. Jur. 2d 447, Courts §§ 85, 86.

Power of court to adopt general rule requiring pretrial conference as distinguished from exercising its discretion in each case separately, 2 A. L. R. 2d 1061.

(b) **Effective Date**: These rules shall take effect on January 1, 1950; and thereafter all laws in conflict therewith shall be of no further force or effect. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the rules take effect would not be feasible or would work injustice, in which event the former procedure applies.

Compiler's Notes.

This Rule is substantially the same as Fed. Rule 86(a) except that it has been adapted to the procedure of this state.

Collateral References.

Courts⇐81.
21 C.J.S. Courts § 176.
20 Am. Jur. 2d 447, Courts § 85.

cient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both. All statements shall be made subject to the obligations set forth in Rule 11.

Compiler's Notes.

This Rule is identical to Fed. Rule 8(e) prior to its amendment February 28, 1966.

Cross-References.

Form of pleadings, Rules of Civil Procedure, Rule 10.

Forms illustrative of pleadings, Rules of Civil Procedure, Appendix.

Motions, forms for, Rules of Civil Procedure, Appendix Forms 20, 23 to 25.

One form of action, Rules of Civil Procedure, Rule 2.

Signing of pleadings, Rules of Civil Procedure, Rule 11.

Election between claims.

Where complaint set forth three alternative claims, two in negligence and one under 35-1-46 and 35-1-57 of Workmen's Compensation Act, it was reversible error for court at pretrial hearing to require election of claim by plaintiff. Rosander v. Larsen, 14 U. (2d) 1, 376 P. 2d 146.

Res judicata.

Action to establish right of way by implied easement was properly dismissed where defendants had obtained judgment in prior action by plaintiff to establish right of way by prescriptive easement, since both issues could have been adjudicated in first action. Wheadon v. Pearson, 14 U. (2d) 45, 376 P. 2d 946.

Separate claims.

In action to recover wages where plaintiff alleged express contract of employment, which defendants in effect admitted but denied they were to pay, court did not err in allowing plaintiff to submit case on both express contract and quantum meruit bases. Morris v. Russell, 120 U. 545, 236 P. 2d 451, distinguished in 1 U. (2d) 175, 176, 264 P. 2d 279, 280.

Collateral References.

Pleading⇦1 to 33.

71 C.J.S. Pleading §§ 1 to 52.

61 Am. Jur. 2d 455 to 498, Pleading § 1 et seq.

Election of remedies, pleading of, 99 A. L. R. 2d 1315.

Express contract: recovery on quantum meruit where only express contract is pleaded, under Federal Rules 8 and 54 and similar state statutes or rules, 84 A. L. R. 2d 1077.

(f) Construction of Pleadings. All pleadings shall be so construed as to do substantial justice.

Compiler's Notes.

This Rule is identical to Fed. Rule 8(f).

Cross-References.

Special forms of pleadings and writs abolished, Rules of Civil Procedure, Rule 65B(a).

Collateral References.

Pleading⇦34.

71 C.J.S. Pleading § 53.

61 Am. Jur. 2d 500, Pleading § 59.

Employee: admissibility, under pleading that tort was committed by defendant, of evidence that it was committed by his servant, 4 A. L. R. 2d 302.

Ejectment action, defense of adverse possession or statute of limitations as available under general denial or plea of general issue in, 39 A. L. R. 2d 1426.

Manner and sufficiency of pleading foreign law, 134 A. L. R. 570.

Pleading waiver, estoppel, and res judicata, 120 A. L. R. 8.

DECISIONS UNDER FORMER LAW

Aider of pleadings.

Principal purpose of written pleadings was to frame and present issues to be tried; while good pleading required facts to be stated directly, pleading could be aided by inference or presumption; in action to quiet title, complaint which alleged that deceased, at time of his death, was owner and in possession of lands was not defective for failure to allege ownership at time action was commenced. Tate v. Rose, 35 U. 229, 99 P. 1003; Tate v. Shaw, 35 U. 240, 99 P. 1007.

Ambiguities.

Ambiguity in pleading as to whether count was for money paid or for money had and received had to be resolved in

(b) **Amendments to Conform to the Evidence.**—When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court shall grant a continuance, if necessary, to enable the objecting party to meet such evidence.

Compiler's Notes.

This Rule is similar to Fed. Rule 15(b) except for deletion from the third sentence of the phrase "and shall do so freely" after "allow the pleadings to be amended."

Construction and application.

This Rule should be read as having two parts, the first of which is applicable when issues not raised in the pleadings are tried by the express or implied consent of the parties, and the second of which is applicable where a motion to amend is made in response to an objection to the introduction of evidence; in the first case the trial court has no discretion whether to allow amendment of the pleadings and must do so; only in the second case may the court determine whether prejudice, undue delay in amending or laches ought to prevent the amendment. General Ins. Co. of America v. Carnicero Dynasty Corp., 545 P. 2d 502.

Affirmative defense not pleaded.

Although Rule 8(c) requires that affirmative defenses be pleaded, it must be looked to in light of the fundamental purpose of the Rules of liberalizing pleading and procedure to the end that parties can present all their legitimate contentions; all that parties are entitled to is notice of the issues raised and an opportunity to meet them; therefore, where defendants did not plead subsequent agreement as an affirmative defense to action on prior agreement and plaintiff, whose objection to evidence on subsequent agreement was overruled, sought no continuance and did not claim surprise or disadvantage in meeting the new issue, trial court not only did not abuse its discretion in allowing issue to be raised and receiving evidence on it but it would have failed the plain mandate of justice had it refused to do so. Cheney v. Rucker, 14 U. (2d) 205, 381 P. 2d 86.

Amendment to conform to evidence.

In action to recover wages for services rendered where complaint was based on both an express contract and on quantum meruit, and court struck quantum meruit after plaintiff's evidence was in, and reinstated it at the close of the defendants' evidence, such ruling on the part of the court was not error in absence of showing that the employer was misled or prevented from presenting all their evidence, since such ruling was equivalent to a rule permitting an amendment to conform to proof. Morris v. Russell, 120 U. 545, 236 P 2d 451, 26 A. L. R. 2d 947; distinguished in 1 U. (2d) 175, 264 P. 2d 279

Where pleading did not fill the requirement of Rule 8(a) but the evidence supported finding that defendant did owe certain amount, failure to amend fully the pleadings to this effect was nonprejudicial in view of this Rule. Seamons v. Andersen, 122 U. 497, 252 P. 2d 209.

Amendment unnecessary.

Wholesaler's complaint that fishing boats were defective and not fit for purposes intended was sufficient to raise the issue of breach of express and implied warranty, without amendment of the pleadings. Pacific Marine Schwabacher, Inc. v. Hydroswift Corp., 525 P. 2d 615.

Consent to try issue.

Where the parties, in an action on an insurance policy, stipulated in their pleadings that the value of a building was $2,000 and while the trial was in progress one of the parties testified that he was to receive $1,000 for the building in a sale, such testimony did not put the value of the building in issue, as alone it did not

RULE 40

ASSIGNMENT OF CASES FOR TRIAL; CONTINUANCE

(a) **Order and Precedence.** The district courts shall provide by rule for the placing of actions upon the trial calendar (1) without request of the parties or (2) upon request of a party and notice to the other parties or (3) in such other manner as the courts deem expedient. Precedence shall be given to actions entitled thereto by statute.

Compiler's Notes.

This Rule is similar to Fed. Rule 40 except that it substitutes "by statute" for "by any statute of the United States" at the end of the Rule.

Collateral References.

Trial⇐1-7.
88 C.J S. Trial §§ 18-35.
75 Am. Jur. 2d 138, 139, Trial §§ 25, 26.

DECISIONS UNDER FORMER LAW

Construction and validity of local rule.

District court rule which provided that clerk should make up trial calendar five days before first day of each term, including all cases at issue noticed for term prior to making of calendar, etc., required either appellant's or respondent's attorney to serve notice required by rule before each term of court to entitle case to be placed on list of cases to be tried at that term, or in absence of notice, special order of court had to be obtained setting case for trial. Riddle v. Quinn, 32 U. 341, 90 P 893.

District court rule which provided that clerk should make up trial calendar five days before first day of each term, including all cases at issue noticed for term prior to making of calendar, etc., held valid and not contrary to statutory provisions which were merely directory. Riddle v. Quinn, 32 U. 341, 90 P. 893.

(b) **Postponement of the Trial.** Upon motion of a party, the court may in its discretion, and upon such terms as may be just, including the payment of costs occasioned by such postponement, postpone a trial or proceeding upon good cause shown. If the motion is made upon the ground of the absence of evidence, such motion shall also set forth the materiality of the evidence expected to be obtained and shall show that due diligence has been used to procure it. The court may also require the party seeking the continuance to state, upon affidavit or under oath the evidence he expects to obtain, and if the adverse party thereupon admits that such evidence would be given, and that it may be considered as actually given on the trial, or offered and excluded as improper, the trial shall not be postponed upon that ground.

Compiler's Notes.

There is no Fed. Rule covering this subject matter.

Cross-Reference.

Amendment of pleadings to conform to evidence, continuance upon, Rules of Civil Procedure, Rule 15(b).

Physical condition of party.

Refusal to grant continuance in personal injury case was an abuse of discretion where plaintiff was not able to attend the trial because of his physical condition, there was no evidence of malingering by the plaintiff, and the plaintiff's testimony was essential to his case. Bairas v. Johnson, 13 U. (2d) 269, 373 P. 2d 375.

Procedural delays.

Court properly denied motion for continuance in action based on credit card obligation which had been procedurally delayed for two and a half years by interrogatories and by various motions of the defendant; and although trial date had been set for four months, motion for continuance was not filed until nine days before trial. First Security Bank v. Johnson, 540 P. 2d 521.

tions were not between same parties; consolidation was not prejudicial error where no substantial right of any defendant was affected. New York Jobbing House v. Sterling Fire Ins. Co., 54 U. 394, 182 P. 361.

Unlawful detainer and action to try title.

Plaintiff's motion in unlawful detainer proceeding that such proceeding and equitable action to try title brought by defendant be joined was properly overruled, since defendant had right to have issues in unlawful detainer proceeding tried by jury, which might not have been case if actions were tried together. Williams v. Nelson, 65 U. 304, 237 P. 217.

(b) **Separate Trials.** The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues.

Compiler's Notes.

This Rule is identical to Fed. Rule 42 (b) prior to its amendment in 1966.

Cross-Reference.

Separate trials authorized, Rules of Civil Procedure, Rule 20(b).

Separate issues tried separately.

Any separate issue may be tried separately when the trial court considers it convenient or desirable in the interest of justice. Page v. Utah Home Fire Ins. Co., 15 U. (2d) 257, 391 P. 2d 290.

Collateral References.

Action⇐60; Trial⇐3, 4.

1 C.J.S. Actions §§ 117-122; 88 C.J.S. Trial §§ 7-10.

1 Am. Jur. 2d 647, Actions § 127; 75 Am. Jur. 2d 123-132, Trial §§ 7-16.

Power of equity to enjoin prosecution of independent actions at law by different persons injured by the same tort, 75 A. L. R. 1444.

Propriety of separate trials of issues of tort liability and of validity and effect of release, 4 A. L. R. 3d 456.

Right of defendant sued jointly with another or others in action for personal injury or death to separate trial, 174 A. L. R. 734.

Right of plaintiff suing jointly with others to separate trial or order of severance, 99 A. L. R. 2d 670.

Separate trial of issues of liability and damages in tort, 85 A. L. R. 2d 9.

RULE 43

EVIDENCE

(a) **Form and Admissibility.** In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these Rules. All evidence shall be admitted which is admissible under the statutes of this state or under the rules of evidence heretofore applied in the courts of this state. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in like manner.

Compiler's Notes.

This Rule is similar to Fed. Rule 43(a), as it existed prior to its amendment in 1972, except for deletion of material in the former Fed. Rule dealing with the application of state evidentiary rules in Federal Courts.

Cross-References.

Evidence generally, 78-25-1 et seq.

Extrinsic policies affecting admissibility, Rules of Evidence, Rules 41 to 55.

General abolition of disqualifications and privileges of witnesses and of exclusionary rules, Rules of Evidence, Rule 7.

Hearsay evidence, Rules of Evidence, Rules 62 to 66.

Witnesses generally, 78-24-1 et seq.

Admissibility.

Where a conditional seller, having resold repossessed goods and having credited the proceeds to the buyer, sued for the difference under the contract, the

13 Utah 2d 269

Paul BAIRAS, Plaintiff and Appellant,

v.

Lanard JOHNSON and Norman Cram, coadministrators of the estate of Philip G. Fulstow, deceased, Defendants and Respondents.

No. 9599.

Supreme Court of Utah.

July 6, 1962.

Action against estate for personal injuries suffered when deceased's automobile ran off highway. The District Court, Kane County, Ferdinand Erickson, J., dismissed the complaint upon the merits after refusing plaintiff's request for a five-week continuance and the plaintiff appealed. The Supreme Court, Callister, J., held that refusal to grant an additional five-week continuance, even though plaintiff had previously been granted a three-month continuance because of inability personally to attend trial, was an abuse of discretion where there was no evidence of malingering, where original three-month continuance had been based upon physician's prediction as to when plaintiff could make the trip, and where nature of action made plaintiff's personal testimony essential.

Reversed and remanded to proceed in accordance with decision.

1. Appeal and Error ⇨966(1)

Reviewing court should not reverse trial court's continuance ruling without a showing that trial court has abused its discretion. Rules of Civil Procedure, rule 40(b).

2. Continuance ⇨19

In determining whether to grant continuance, court should examine reasonableness of request in light of the tradition that a party should be afforded every reasonable opportunity to be in attendance at his trial. Rules of Civil Procedure, rule 40(b).

3. Depositions ⇨14

Resort to deposition to introduce party's testimony should be done only when circumstances will not reasonably allow a desirous party to appear in his own behalf.

4. Continuance ⇨51(2)

Refusal to grant an additional five-week continuance to plaintiff in personal injury action even though plaintiff had previously been granted a three-month continuance because of inability to personally attend trial, was an abuse of discretion where there was no evidence of malingering, where original three-month continuance had been based upon physician's prediction as to when plaintiff could make the trip, and where nature of case made it peculiarly important that plaintiff testify in person.

5. Continuance ⇨40

Failure of plaintiff to serve request for continuance five days prior to date of hearing and to make affidavits did not justify denial of continuance where plaintiff's counsel had been taken by surprise in discovering need for continuance because of late medical opinion of necessity of an additional operation. Rules of Civil Procedure, rules 6(d), 40(b).

6. Venue ⇨50

Motion for change of venue by plaintiff in action for injuries resulting when automobile ran off highway was properly denied even though certain persons in community were of the opinion that plaintiff and not defendant's decedent had been driving the automobile at the time of the accident.

Gardner & Burns, Cedar City, Nathan Goller, Beverly Hills, Cal., for appellant.

Hanson & Baldwin, Merlin Lybbert, Salt Lake City, Olson & Chamberlain, Richfield, for respondents.

CALLISTER, Justice.

From a judgment of the lower court dismissing his complaint upon the merits and defendants' counterclaim without prejudice, the plaintiff appeals. He contends that the court erred in denying his motions for a continuance and change of venue.

On July 5, 1960, the plaintiff and Philip G. Fulstow were the sole occupants of the latter's automobile which ran off a highway in Coconino County, Arizona. Fulstow died as a result of the accident, and the plaintiff suffered a broken neck, causing him to be paralyzed from the neck down. Plaintiff was removed to a hospital in California where, at all times pertinent hereto, he has remained as a ward of the county of Los Angeles. The defendants are the duly appointed administrators of the estate of Philip G. Fulstow.

The plaintiff filed a claim with the estate for $500,000 for personal injuries which was rejected. On March 9, 1961, the next to last day of the allowable period of time,[1] the plaintiff commenced this action. In his complaint the plaintiff alleged that Fulstow was driving the automobile at the time of the accident in a negligent and reckless manner which caused the accident and plaintiff's resulting injuries. Defendants filed a counterclaim asserting that the plaintiff was the driver of the automobile at the critical moment, and that the accident was his fault.

Trial of the action in Kane County was first set for June 14, 1961, but it was postponed until June 28, 1961, to accommodate the personal convenience of one of plaintiff's counsel. On June 22, 1961, plaintiff filed a motion to vacate the trial setting for the reason that plaintiff was confined in the hospital and unable to travel from California to Utah. This motion was argued on the 26th of June. There was produced and filed an affidavit of Dr. C. H. Imes, plaintiff's attending physician at the hospital. This affidavit was to the effect that the plaintiff was not physically able to make a trip to Utah and be present at the trial on June 28th, but that it was the doctor's opinion that the plaintiff would be able to do so in approximately three months.

This motion was vigorously resisted by the defendants who asserted that the estate had been ready to close for three months, and that the instant action was the sole barrier to a final disposition of that matter. Moreover, penalties and interest would begin to run on July 5, 1961, unless the estate and inheritance tax returns were filed on that date. They also argued that Fulstow's heirs, his elderly mother and father, were suffering hardship and inconvenience by reason of the delay in the distribution of the estate.

After hearing argument thereon, the lower court granted a continuance to September 20, 1961, and entered an order to that effect which read in part as follows:

> "IT IS FURTHER ORDERED, that if it appears that the Plaintiff will not be physically capable of testifying in person at the trial on September 20, 1961 that his deposition will be taken by Plaintiff's counsel for use at the trial if the Plaintiff's testimony is to be admitted and that notice of taking of such deposition shall be given to counsel for the Defendants not less than ten days prior to the time set for the taking thereof.
>
> "The court notes for the record that the foregoing terms and conditions were stipulated to by counsel for the Plaintiff in consideration for the Court granting the instant continuance."

On September 18, 1961, plaintiff's California counsel, Mr. Nathan Goller, sent to the trial judge a telegram advising that the plaintiff would be unable to attend the scheduled trial on September 20th. He also notified plaintiff's local counsel who, in turn, endeavored to notify counsel for the defendants. On September 20th defendants were in court with their witnesses ready for trial, and a jury had been summoned and was in the box. Local counsel for the plaintiff were present and moved the court for a continuance and for a change of venue.

In support of the motion for a continuance, there was presented a new affidavit of Dr. Imes and an affidavit of Mr. Goller.

1. 75-9-9, U.C.A.1953.

This second affidavit of Dr Imes, dated September 18, 1961, stated in effect that the present condition of the plaintiff was one of improvement, but not to an extent to permit him to travel and attend the trial in Utah. Dr Imes stated that plaintiff was scheduled for surgery of a genito urinary nature during the week of September 18th which would prevent him from leaving the hospital at that time. It was the intention of the hospital, according to the doctor, to discharge the plaintiff in approximately five weeks and provide outpatient care and an assistant It was Dr Imes' opinion that at that time the plaintiff, if accompanied by the assistant, could make the journey and attend the trial.

The affidavit of Nathan G Goller, also dated September 18, 1961, was to the effect that up until September 17th he had been of the opinion that the plaintiff would be released from the hospital for the purpose of attending the trial in Utah on the 20th of September, and that he had made the necessary transportation arrangements

The foregoing motions were argued extensively, the defendants strenuously opposing them The trial judge finally denied the motions, and a jury was impanelled The motion for continuance was renewed by plaintiff's counsel and was again denied Plaintiff's counsel endeavored to proceed by offering into evidence as an exhibit the discovery deposition of the plaintiff taken June 24, 1961, on behalf of the defendants [2] The defendants objected to this procedure, claiming they had a right to make objection to inadmissible evidence in the deposition The court ruled that the deposition could be published and used in the manner provided by our civil rules of procedure subject to proper objections but that it could not be used in its entirety as an exhibit Plaintiff thereupon withdrew the offer and rested The judgment of dismissal with prejudice was then granted The trial judge indicated that there were insufficient grounds to grant the motion for a continuance and that timely notice had not been given

On a motion for a new trial, the plaintiff filed three additional affidavits, his own, that of Dr Edward Bobo, and a second one of Nathan G Goller Plaintiff, in his affidavit, described his physical condition and stated that three weeks prior to the scheduled trial date he had commenced preparation for the trip and that it was not until a week prior to his intended departure that he was advised by the doctors that he could not leave the hospital, and that he was scheduled for an operation He notified Mr Goller as soon as possible of this development Plaintiff was operated upon on September 21, 1961, and expressed, in his affidavit, the opinion that he would be able to make the journey in about five weeks

The affidavit of Dr Bobo was to the effect that he performed a trans-urethral resection of plaintiff's prostate on September 21, 1961, and that plaintiff's condition had not warranted such an operation prior to that date

Mr Goller's second affidavit was to the effect that it was not until September 17, 1961 that he became aware that the plaintiff could not attend trial on September 20, 1961 that up until that time he had been of the opinion that plaintiff would be able to attend and had not, therefore thought it necessary to take plaintiff's deposition

The motion for a new trial was denied

[1 2] Rule 40(b) U R C P provides that the granting of a continuance lies in the trial court's discretion This case presents one of those difficult instances in which it is necessary to examine the reasonableness of the exercise of that discretion Certainly this court should not reverse the ruling of the trial court absent a showing

2. Prior to the taking of this deposition counsel for defendants wired plaintiff's counsel offering them the opportunity to take plaintiff's deposition on his own behalf This offer was not accepted although Mr Goller attended the deposition and asked some questions

that the latter abused its discretion [3] However, it is in accord with the most fundamental traditions of our legal system that a party should be afforded every reasonable opportunity to be in attendance at his trial [4]

[3] Obviously, there may be times when a party may be able to add little or nothing by way of assistance or testimony at a trial, and in such an instance there may be little reason to grant a continuance to accommodate an absent party. But such is not the instant case. The plaintiff's testimony is essential to his case Moreover, the superiority of oral testimony to that taken by deposition is apparent, and resort to a deposition to introduce a party's testimony of trial should only be done when the circumstances will not reasonably allow a desirous party to appear in his own behalf

[4] Under the peculiar facts of this case, we believe that the trial court's refusal to grant an additional continuance for five weeks, even in view of its prior order of June 26, 1961, was an abuse of discretion Whatever might have been the case if only the absence of a witness were involved, rather than a party, the decision of this court must be tempered by the fact that there is no evidence of malingering by the plaintiff. Courts should not foreclose one from a full hearing where it appears that it is impossible for physicians to predict with precision the date on which one who is recovering from a serious misfortune will be able to appear in court. If plaintiff's condition offered little hope for sufficient recovery, there would have been justification for the denial of the continuance However, there was evidence, by way of affidavits, that plaintiff was improving and would be able to attend trial in approximately five weeks.

Not considering the court's order of June 26, 1961, granting a continuance upon the conditions it did, we think the trial court would have obviously abused its discretion in refusing a further continuance on September 20 However, that order does not essentially change the situation in view of the importance of allowing a party to be in attendance at the trial to testify and assist his counsel For the same reason the plaintiff was entitled to a further continuance even though his counsel might have taken the precaution of taking plaintiff's deposition prior to the September 20th trial date

We are, of course, cognizant that the five-week delay would have resulted in some hardship to the defendants and others, and that two witnesses have died since the accident However, the relative significance of these facts is overshadowed by the potential loss to the plaintiff

[5] The trial court also based its denial of a continuance on the failure of the plaintiff to make his motion timely and in a proper manner Defendants claim that the motion was defective because it was not served five days prior to the date of hearing and because it was not accompanied by affidavits As to the latter point, the defendants rely on the case of Lancino v Smith [5] to support the proposition that accompanying affidavits are necessary Whatever might have been the rule prior to its adoption, Rule 40(b) of our present rules of civil procedure does not expressly require affidavits to accompany a motion for continuance Moreover, the reporter's notes following Rule 40(b) state that "the motion need not be by affidavit as was required by former section"

As to the fact that the motion was not served five days before the hearing as defendants claim is required by Rule 6(d), we hold that whatever the rule might be when counsel have ample time within which to make a motion for continuance, when counsel are taken by surprise, as in this case, so that they do not have five days in

3. Sharp v Cankis Gianulakis, 63 Utah 249, 225 P. 337.

4. Jaffe v Lilienthal, 101 Cal. 175, 35 P. 636, cf. Westfall v Motors Ins Corp., 136 Mont. 449, 348 P 2d 784 (1960).

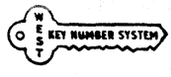
5. 36 Utah 462, 105 P 914.

which to serve the motion, they are not precluded from making the motion.

[6] The ruling of the trial court denying plaintiff's motion for a change of venue is sustained. The plaintiff filed in support of his motion a petition signed by several residents of Kane County and an affidavit of a traveling salesman both to the effect that many people in the county were of the opinion that plaintiff had been driving the car at the time of the accident, and thus plaintiff could not have a fair and impartial trial in Kane County. Under the circumstances it cannot be said that the lower court abused its discretion in denying the motion.

Reversed and remanded to proceed in accordance with this decision. No costs awarded.

WADE, C. J., and HENRIOD, McDONOUGH and CROCKETT, JJ., concur.



13 Utah 2d 275

SURETY LIFE INSURANCE COMPANY, Plaintiff,

v.

STATE TAX COMMISSION of Utah, Defendant.

No. 9570.

Supreme Court of Utah.

July 3, 1962.

Original proceeding to review decision of Tax Commission refusing to allow deduction in insurance company's tax return. The Supreme Court, Wade, C. J., held that statute requiring insurance commissioner to make triennial examination of affairs of domestic corporation authorized to do business outside state coincident with and as part of convention examination of corporation made by other states, did not limit statute providing for deduction by insurer in its insurance tax return for expenses it is required to make for such examination, so that insurer doing business outside of state was able to deduct full amount paid for examination of its business conducted by insurance commissioner.

Decision of commission vacated.

1. Taxation ⇐387

Domestic insurer doing business outside of state was entitled to deduct, in computing premium tax, full amount paid for examination of its out-of-state business conducted by insurance commissioner. U.C.A.1953, 31-3-1, 31-3-6, 31-14-4(3).

2. Taxation ⇐387

Tax commission, in refusing to allow deduction on domestic insurer's insurance tax return for expenses incurred in conducting triennial examination of its out-of-state business by tax commission and promulgating prorata deduction rule, went beyond its rule-making powers. U.C.A.1953, 31-3-1(3), 31-3-6, 31-14-4(3).

Marr, Wilkins & Cannon, J. Thomas Greene, Salt Lake City, for plaintiff.

A. Pratt Kesler, Atty. Gen., Norman S. Johnson, Asst. Atty. Gen., Salt Lake City, for respondent.

WADE, Chief Justice.

Surety Life Insurance Company, plaintiff herein, seeks review of a decision of the State Tax Commission of Utah, defendant herein, refusing to allow a deduction in plaintiff's insurance tax return for 1959 for the full amount paid by plaintiff for an examination of its business conducted by defendant.

Plaintiff is a stock legal reserve life insurance company organized and domiciled in Utah. During the year 1959 plaintiff was qualified and doing business in a number of states besides Utah. Under the pro-

a contrary agreement between the parties to the proxy

In the instant case, the proxies did 'otherwise provide' since they contained express language that declared them to be irrevocable The irrevocable nature of the proxies effectively neutralized the termination language of the statute, and therefore they remained valid until revoked

Generally, a proxy is revocable at the pleasure of the stockholder even though by its terms it is declared to be irrevocable [1] However, a proxy, coupled with an interest, constitutes an exception to the general rule, and such a proxy is irrevocable whether or not the instrument so provides [2] Again, however, there is an exception to that exception. Although a proxy is given for a valuable consideration, it may be revoked where it is used for a fraudulent purpose [3]

In this case, the trial court aptly observed that the proxies were coupled with an interest, but it erred in not declaring them to have been lawfully revoked The stockholders had every right to revoke the proxies by reason of the breaches of faith on the part of Baggs and in light of his unauthorized activities that were wholly inconsistent with the purpose of the proxies and contrary to the best interests of the corporation and the stockholders

On remand, I would also direct the entry of a judgment declaring the proxies invalid, but would do so on the basis of the lawfulness of the revocation thereof by the stockholders

HOWE and DURHAM, JJ , concur in the concurring and dissenting opinion of HALL, C J

1. 19 Am Jur 2d Corporations § 675

2. *Id.* at § 676

Preston BOWN and Olive Bown, Plaintiffs and Respondents,

v.

McKay M. LOVELAND, Defendant and Appellant.

No. 18686.

Supreme Court of Utah

Feb 1, 1984

Grantors brought action seeking construction of warranty deed that they executed in favor of grantee who had paid debt of grantors to third party based on oral understanding he was to double his money in return The Second District Court, Davis County, Douglas L Cornaby J , found that transaction was a consumer related loan, that deed was intended to be equitable mortgage, and that transaction was unconscionable, and reformed deed and grantee appealed The Supreme Court, Hall, C J , held that (1) remedy of reformation of warranty deed was improper, (2) transaction was "consumer-related loan", (3) understanding that grantee was to double his money in return for loan had no validity as contract, and (4) evidence did not clearly preponderate against finding of district court that warranty deed was mortgage intended as security for loan

Affirmed in part and vacated and set aside in part

1. Deeds ⇐124

Warranty deed executed without any reservations conveys in fee simple all of rights and interests grantor has in premises therein described.

2. Reformation of Instruments ⇐19(1), 20

To reform written warranty deed or any written instrument, plaintiff must show mutual mistake of parties or mistake

3. 18 C J S Corporations § 550g

on part of one and fraud or inequitable conduct on part of other, as result of which instrument reflects something neither party had intended or agreed to.

3. Reformation of Instruments ⇐36(3), 45(1, 4)

To reform written warranty deed or any instrument, proof of mistake must be presented by clear and convincing evidence; furthermore, party seeking reformation of deed due to mutual mistake must plead such mistake with particularity.

4. Reformation of Instruments ⇐41

Where pretrial order listing issues to be tried in grantors' action seeking construction of warranty deed did not mention specifically or by implication question of mistake or deed reformation, grantors did not raise mistake during trial and did not argue mistake or reformation in their post-trial memorandum, and explicit testimony and logic inherent in transaction indicated grantee intended to acquire entire piece of property subject to grantors' option to repurchase and that grantors understood this to be the case, reformation of warranty deed on basis of mutual mistake was improper.

5. Consumer Credit ⇐1

Transaction whereby grantors executed warranty deed on their property was not "consumer loan," where grantee was realtor, not regularly engaged in business of making loans, and debt was not incurred by grantors primarily for personal, family, household or agricultural purposes, but for use in stone-cutting business. U.C.A.1953, 70B-3-104.

See publication Words and Phrases for other judicial constructions and definitions.

6. Consumer Credit ⇐4

"Loan," for purposes of statute defining consumer-related loan, is made when creditor creates debt by advancing money to person on behalf of debtor. U.C.A.1953, 70B-3-602 (Repealed).

See publication Words and Phrases for other judicial constructions and definitions.

7. Consumer Credit ⇐33

Where grantors of warranty deed owed debt, which was secured by trust deed on the real property, to leasing company to secure lease on bulldozer to be used in stone-cutting business, grantee made payment to leasing company in return for which he received assignment of leasing company's interest as lessor of bulldozer and assignment of trust deed, and both grantors and grantee understood that if grantee advanced sum to leasing company, grantors would owe grantee approximately double that amount, transaction was "consumer-related loan." U.C.A.1953, 70B-3-602 (Repealed).

8. Consumer Credit ⇐60

Pursuant to statute governing consumer-related loans, parties may not contract for default charges in excess for those provided in statute; therefore, parties' oral understanding that grantee of warranty deed was to double his money in return for loan to grantors to save grantors from foreclosure action brought by third party had no validity. U.C.A.1953, 70B-1-102; U.C.A.1953, 70B-3-602, 70B-3-604(1, 2) (Repealed).

9. Mortgages ⇐32(3)

Deed, absolute in form, may be construed as mortgage if it is intended as security under parol agreement rather than an outright conveyance.

10. Mortgages ⇐38(2)

Burden of proof is on party claiming that warranty deed was mortgage to show by clear and convincing evidence that conveyance was intended as mortgage

11. Mortgages ⇐32(1)

Elements to be considered in determining whether absolute deed is intended as mortgage include: whether there was continuing obligation on part of grantors to pay debt or meet obligation which it is claimed deed was made to secure; question of relative values; contemporaneous subsequent acts; declarations and admissions of parties; form of written evidences of transactions; nature and character of testimony

relied on, various business, social or other relationship of parties, and apparent aims and purposes to be accomplished

12. Appeal and Error ⇨1009(2)

Standard of appellate review of findings in equity cases, even where level of proof in trial court is clear and convincing evidence, is clearly preponderates standard

13. Mortgages ⇨38(1)

Evidence in grantors action seeking construction of warranty deed, including evidence that property covered by warranty deed was appraised for over $100,000, that both grantors and grantee understood there was continuing obligation on part of grantors to pay grantee double his investment, that both parties operated under assumption that if there was sale of property, grantee was entitled to only double amount paid plus expenses with remainder belonging to grantors, and that grantors' son and his family continued to live on and use property rent free after transfer of warranty deed, did not clearly preponderate against finding of district court that warranty deed was mortgage and intended as security for loan

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Richard L. Bird, Jr., David J. Bird, Salt Lake City, for defendant and appellant

George K. Fadel, Bountiful, for plaintiffs and respondents

HALL, Chief Justice

Plaintiffs Preston and Olive Bown brought this action seeking construction of a warranty deed that they executed in favor of defendant McKay Loveland. Loveland appeals from a decision of the district court which found that the transaction was a consumer-related loan covered by the Utah Uniform Consumer Credit Code, that the deed was intended to be an equitable mortgage and that the transaction was unconscionable. The court further reformed the deed. We affirm in part and reverse in part.

In March, 1978, the Bowns executed a trust deed on the north 466 feet of real property owned by them in Davis County, Utah, to MFT Leasing to secure a lease on a bulldozer to be used in a stone-cutting business. When the Bowns defaulted in their payments on the loan, MFT commenced foreclosure proceedings. Approximately two weeks before the scheduled trustee's sale, Preston Bown approached Loveland, a realtor for whom Bown had done work in the past, and offered to sell him the south end of the Bowns' property in order to raise the money to pay off MFT. Loveland declined to buy. On February 10, 1981, the day before the trustee's sale, Bown again contacted Loveland in an effort to arrange a deal to prevent foreclosure by MFT. Loveland agreed to rescue Bown from the foreclosure action only if Loveland could double the money he put up in the transaction. Pursuant to their agreement, Loveland paid MFT the amount owed on the loan ($23,403.76) and received an assignment of the lease on the bulldozer and the trust deed. Bown then executed a warranty deed to Loveland conveying both the north and south portions of the Bowns' property, subject to an oral option to repurchase for approximately $50,000 within six months. Soon after this transaction, Loveland placed "For Sale" signs on the property and potential purchasers were referred to him. The Bowns' son continued to live on the property rent-free.

Nearly eight months after the warranty deed was signed, Loveland informed the Bowns that he intended to sell the property and that the repurchase option would expire on October 5, 1981. The Bowns thereupon brought this action to construe the warranty deed, claiming that the transaction was not a sale but a mortgage.

I

The trial court found that the Bowns did not intend the south portion of the property to be included in the warranty deed and that Loveland did not know it had been included until after the deed was recorded. The court therefore ordered that the south portion be deleted from the deed.

[1–3] A warranty deed executed without any reservations conveys in fee simple all of the rights and interests the grantor has in the premises therein described [1] To reform a written warranty deed or any written instrument, the plaintiff must show mutual mistake of the parties or mistake on the part of one and fraud or inequitable conduct on the part of the other, as a result of which the instrument reflects something neither party had intended or agreed to [2] Proof of the mistake must be presented by clear and convincing evidence [3] A party seeking reformation of a deed due to mutual mistake must plead such mistake with particularity [4]

In the Bowns' complaint neither mistake nor fraud was pled, much less described with particularity The only mention made in the complaint of the inclusion of the south portion of the property in the warranty deed and the one the Bowns rely on to support their claim of having pled with particularity was in the context of a recitation of fact "As additional security the defendant required the plaintiffs to execute a deed prepared by the defendant who is a realtor to the property covered by the Trust Deed plus additional property adjoining thereto" This statement does not allege mistake Rather it appears to be an admission that there was no mistake

Rule 15(b) Utah R of Civ P provides that when issues not raised by the pleadings are tried by the express or implied consent of the parties, those issues should be treated as if they had been raised in the pleadings However in this case there is no evidence in the record to indicate that both parties implicitly understood that the issue of mistake of description in the warranty deed was being tried Justice requires that if an issue is to be tried and a party's rights influenced thereby, that party must have notice of the issue and an opportunity to meet it [5] Those elements are lacking here

[4] Furthermore the record does not reflect that mistake was raised in the context of the trial The pretrial order listing the issues to be tried does not mention specifically or by implication the question of mistake or deed reformation Plaintiffs did not raise mistake during the trial and did not argue mistake or reformation in their post trial memorandum On this basis alone reformation of the deed was improper

Finally the evidence in the record in any way relating to the intent of the parties as to the description of the land to be conveyed does not rise to the standard of clear and convincing that is required to reform a deed showing no ambiguity on its face In fact, the evidence is to the contrary Both explicit testimony and the logic inherent in the transaction indicate that Loveland intended to acquire the entire piece of property subject to the Bowns option to repurchase and that the Bowns understood this to be the case

Therefore since mutual mistake of fact was neither pled nor proven by clear and convincing evidence the remedy of reformation of the warranty deed was improper

II

Loveland also contends that the finding of the trial court that this transaction was a consumer related loan governed by the Utah Uniform Consumer Credit Code U C A 1953 §§ 70B-3-602 to -604, and thus subject to a maximum 18 percent interest is in error [6] U C A 1953 § 70B-3-

1. U C A 1953 § 57-1-12 *see also Hatch v Bassnan* Utah 567 P 2d 1100 (1977)

2. *Thompson v Smith* Utah 620 P 2d 520 (1980)

3. *Hatch supra* note 1 at 1102

4. Rule 9(b) Utah R Civ P *see also Neeley v Kelsch* Utah 600 P 2d 979 (1979)

5. *See e g Williams v State Farm Ins Co* Utah 656 P 2d 966 (1982)

6. U C A 1953 §§ 70B-3-602 to -604 were repealed by the 1981 Utah State Legislature Laws of 1981 ch 279 § 8 However pursuant to Art VI § 25 of the Utah State Constitution the repeal does not take effect until 60 days after adjournment unless otherwise provided The repeal was approved March 25 1981 with no effective date provision Therefore §§ 70B-3-602 to -604 were in effect when this transaction took place February 10 1981

602 provides that a "consumer related loan" is "a loan which is not subject to the provisions of this act applying to consumer loans and in which the principal does not exceed $25,000; if the debtor is a person other than an organization."

U.C.A., 1953, § 70B-3-104 defines a "consumer loan" as:

> [A] loan made by a person regularly engaged in the business of making loans in which
>
> (a) the debtor is a person other than an organization;
>
> (b) the debt is incurred primarily for a personal, family, household, or agricultural purpose;
>
> (c) either the debt is payable in installments or a loan finance charge is made; and
>
> (d) either the principal does not exceed $25,000 or the debt is secured by an interest in land.

[5] This transaction is clearly not a consumer loan since Loveland, a realtor, is not regularly engaged in the business of making loans[7] and the debt was not incurred by the Bowns primarily for a personal, family, household, or agricultural purpose, but for use in a stone-cutting business.

The Comment of Commissioners on Uniform State Laws suggests the purposes for which § 70B-3-602, defining a consumer-related loan, was drafted:

> Many relatively small credit transactions with individuals do not fall within the general provisions of the act because the purpose of the transaction is not personal, family, household, or agricultural. However, a debtor in a small transaction for a business purpose may need some protection in credit transactions. Therefore, Part 6 of this Article extends a measure of protection over a special category of relatively small loans defined as consumer related loans. The principal transactions covered are (1) a loan by a lender not regularly engaged in making similar loans, (2) a loan to an individual for a business purpose, and (3) a loan to an organization ....

[6] Accordingly, the first thing to be determined is whether this transaction constitutes a loan. U.C.A., 1953, § 70B-3-106 defines "loan" as including: "(1) the creation of debt by the lender's payment of or agreement to pay money to the debtor or to a third party for the account of the debtor .. " Thus, a loan is made when a creditor creates debt by advancing money to a person on behalf of the debtor.[8]

[7] There is no question that both Loveland and the Bowns understood the payment of $23,403.76 to MFT to be on behalf of the Bowns. Both parties testified that the payment was to be paid to MFT to rescue the Bowns from the foreclosure action.

The question thus remains whether the payment to MFT by Loveland on behalf of the Bowns creates debt. "Debt" has been defined variously, but generally it is an obligation to pay a fixed and certain sum of money.[9]

The Bowns owed a debt of $23,403.76 to MFT Leasing. As a result of his $23,403.76 payment to MFT, Loveland received an assignment of MFT's interest as lessor of the bulldozer and assignment of the trust deed. Thus the sum certain debt owed by the Bowns to MFT became a sum certain debt owed by the Bowns to Loveland.

Further, both parties understood that if Loveland advanced the $23,403.76 to MFT, the Bowns would owe Loveland approximately double that amount.[10] Therefore, a

7. *Bekins Bar V Ranch v. Huth*, Utah, 664 P.2d 455 (1983).

8. Comment of Commissioners on Uniform State Laws.

9. *See, e.g., Burke v. Boulder Milling & Elevator Co.*, 77 Colo. 230, 235 P. 574, 575 (1925).

10. This type of transaction is exactly the type of transaction that the Utah Uniform Consumer Credit Code and § 70B-3-602 were enacted to cover: a small businessman, needing credit, and subject to usurious demands by a lender if not given some protection. *See also* U.C.A., 1953, § 70B-1-102, Purposes—Rules of Construction.

fixed and certain sum of money was due and owing by the Bowns to Loveland and a debt was created.

Finally, Loveland, while disclaiming creation of a debt, contends that the warranty deed executed on his behalf was intended as payment of the debt secured by the trust deed. While we reject this contention, *infra*, the point to be made here is that payment of a debt does not make the fact that there was a debt disappear.

This transaction was clearly a consumer-related loan. Therefore, under the provisions of 70B-3-604(1), default charges in this case are limited to: "(a) reasonable attorney's fees and reasonable expenses incurred in realizing on a security interest; (b) deferral charges not in excess of 18 per cent per year of the amount deferred for the period of deferral; and (c) other charges that could have been made had the loan been a consumer loan."

[8] Section 70B-3-604(2) provides that, with respect to consumer-related loans, the parties may not contract for default charges in excess of those provided in the Act. Therefore, the parties' apparent oral understanding that Loveland was to double his money in return for the loan has no validity as a contract and the provisions of § 70B-3-604(1) govern.

III.

Loveland also contends that the trial court erred in finding that the warranty deed executed by the Bowns to Loveland was a mortgage intended as security for the loan.

[9, 10] This aspect of the case is essentially one in equity since the Bowns, in asking the court to give the warranty deed and option to repurchase the effect of a mortgage, are seeking equity.[11] It has long been recognized that a deed, absolute in form, may be construed as a mortgage if it is intended as security under a parol agreement rather than an outright conveyance.[12] Parol evidence is admissible to show the purpose and intent of parties to a deed.[13] The burden of proof is on the party claiming a mortgage, here the Bowns, to show by clear and convincing evidence that the conveyance was intended as a mortgage.[14]

[11] Some of the elements to be considered in determining whether an absolute deed is intended as a mortgage include:

> Whether or not there was a continuing obligation on the part of the grantor to pay the debt or meet the obligation which it is claimed the deed was made to secure; the question of relative values; the contemporaneous and subsequent acts; the declarations and admissions of the parties; the form of the written evidences of the transactions; the nature and character of the testimony relied on; the various business, social, or other relationship of the parties; and the apparent aims and purposes to be accomplished.[15]

[12] The standard of appellate review of findings in equity cases, even where the level of proof in the trial court is "clear and convincing evidence," is the "clearly preponderates standard."[16] Under that standard, after reviewing the evidence in this case in light of the elements set forth, we are unable to conclude that it clearly preponderates against the finding of the district court on this issue.

[13] For example, the evidence reveals that, first, the property covered by the warranty deed was appraised for over

11. *Willard M. Milne Inv. Co. v. Cox*, Utah, 580 P.2d 607 (1978).

12. *W.M. Barnes Co. v. Sohio Natural Resources Co.*, Utah, 627 P.2d 56 (1981); *see also Kjar v. Brimley*, 27 Utah 2d 411, 497 P.2d 23 (1972); *Corey v. Roberts*, 82 Utah 445, 25 P.2d 940 (1933).

13. *Sohio, supra* note 12.

14. *Baker v. Taggart*, Utah, 628 P.2d 1283 (1981).

15. *Hansen v. Kohler*, Utah, 550 P.2d 186, 188 (1976). *See also Baker, supra* note 14; *Cox, supra* note 11.

16. *Abbott v. Christensen*, Utah, 660 P.2d 254, 257 (1983).

$100,000. Therefore, the payment of $23,403.76 appears to be inadequate consideration to support a sale thereof. Second, both parties understood that there was a continuing obligation on the part of the Bowns to pay Loveland double his investment. Third, both written and oral evidence indicated that both Loveland and the Bowns operated under the assumption that if there was a sale of the property, Loveland was entitled to only double the $23,403.76 plus expenses. The remainder belonged to the Bowns. Fourth, the Bowns' son and his family continued to live on and use the property rent-free after transfer of the warranty deed. All of this evidence points to the intent of the parties that the warranty deed was intended to be a mortgage.

No useful purpose would be served by further analysis of the evidence as it relates to the intention of the parties at the time the deed was executed and delivered. Suffice it to say that the Court remains unpersuaded that the evidence clearly preponderates against the finding of the trial court that the warranty deed was intended as a mortgage. Having so concluded, we do not reach the issue of whether the transaction was unconscionable.

The judgment of the trial court is affirmed except that its order of reformation of the deed is vacated and set aside. No costs awarded.

STEWART, OAKS, HOWE and DURHAM, JJ., concur.

Elwood K. McFARLAND, Plaintiff and Respondent,

v.

SKAGGS COMPANIES, INC., Defendant and Appellant.

No. 18352.

Supreme Court of Utah.

Feb. 1, 1984.

Store customer, mistakenly stopped on shoplifting charges, brought false arrest charges against store seeking $10,000 in compensatory and $50,000 in punitive damages. The Second District Court, Weber County, Ronald O. Hyde, J., entered judgment on jury verdict awarding customer $10,000 in general damages and $25,000 in punitive damages, and store appealed. The Supreme Court, Hall, C.J., held that: (1) act of releasing customer without first taking him before magistrate did not itself constitute abuse of privilege to arrest and did not give rise to liability for false imprisonment; (2) arrest was not justified upon privilege of private citizens to make citizen's arrest of one who has committed assault; and (3) appropriate standard for determining availability of punitive damages award in action for false imprisonment is that of malice in fact or actual malice, and not malice in law.

Affirmed in part, remanded in part.

1. False Imprisonment ⇐2

Where store customer merely got up and left when told he was free to do so after being stopped on shoplifting charges, customer consented to be released from store's custody; thus, act of releasing customer without first taking him before magistrate did not itself constitute abuse of privilege of arrest and did not give rise to liability for false imprisonment.

2. Arrest ⇐68(1)

To be lawful, arrest must be effected in accordance with statutory dictates.

disappeared in 1934. Mrs Savage testified that there never was such a fence within the time of her earliest recollections.

[2] As previously noted the city has shown no title to 21st East Street where it adjoins plaintiffs' property. Its only valid claim thereto is based on plaintiffs' failure to establish their title to the disputed strip or on prescription or adverse user. In view of these facts, although the court as we have held, erred in quieting the plaintiffs' title to the part of the disputed strip east of the fence line on the east side of the row of large trees, this does not apply to the part of this strip west of that fence line. As to the west part of this strip the evidence is clear that plaintiffs and their predecessors have possessed, occupied and used it adversely to all the world, including the city, under claim of right, and had it enclosed by a substantial fence and have paid all the taxes assessed against it for more than 20 years. There is no evidence that the city has ever possessed or used it either for a right of way or otherwise, or held any valid claims thereto. Thus plaintiffs have established their ownership to this strip by adverse user for more than 7 years immediately preceding the commencement of this action.

[3-5] Although Section 78-12-13, U.C.A.1953, prohibits a person from acquiring "any right or title in or to any lands held by any" city designated for use as a street, it has no application to this case, for the city has completely failed to show that this land is now or ever has been "held" by the city, as that term is used in this statute. In order for the city to hold property under the above statute, it must have some semblance of title, possession or the right to the use thereof. It is not sufficient to establish a holding by the city for the city engineers to make a survey of the property and destroy a fence which serves as a boundary line between the street and adjoining property and verbally assert that the city is the owner of such property. That is about the extent of the holding by the city of this property.

The judgment of the trial court is reversed as to the land lying east of the east side of the fence with directions that the trial court take evidence and determine the location where the east side of that fence was. In all other respects the trial court's judgment is affirmed.

Each side shall bear its own costs.

McDONOUGH, C. J., and CROCKETT, WORTHEN and HENRIOD, JJ., concur.

6 Utah 2d 226

BUEHNER BLOCK COMPANY, a corporation, and South State Builders Supply Company, Plaintiffs and Respondents,

v.

Nick GLEZOS, Harry Hong, Charles C. McDermond, Copa Supper Club, a corporation, and Valley Amusement Enterprises, Inc., a corporation, Defendants,

Harry Hong, Defendant and Appellant.

No. 8591.

Supreme Court of Utah.

April 26, 1957.

Action brought by materialmen against lessor, lessee, and alleged partner of lessee in operation of club in building built on leased premises with materials furnished by plaintiffs. The Third Judicial District Court, Salt Lake County, Ray Van Cott, Jr., J., entered a judgment holding the lessee and the third defendant liable for cost of improvements and foreclosing mechanics' liens on leasehold, and the lessee appealed. The Supreme Court, Crockett, J., held that evidence would support finding that lessee had held himself out as a partner of third defendant in operation of club.

Affirmed.

1. Judgment ⇐251(1)

In applying rule providing, in essence, that even though issues are not raised by

pleadings, if they are tried by express or implied consent of parties, final judgment can be rendered on such issues, adverse party should be given benefit of every doubt, and he must not have been misled or in any way prejudiced by introduction of new issues. Rules of Civil Procedure, rules 15(b), 54(c).[1]

2. Courts ⇐85(2)

If an issue is to be tried and a party's rights concluded with respect thereto, he must have notice thereof and an opportunity to meet it. Rules of Civil Procedure, rules 15(b), 54(c).[2]

3. Judgment ⇐251(1)

Where partnership issue was raised during trial without objection on defendant's part, and both sides went into facts as to whether a partnership was shown, and there was no indication that defendant was surprised or misled by introduction of such issue, fact that issue had not been formally raised by pleadings or by motion to amend did not vitiate finding on such issue. Rules of Civil Procedure, rules 15(b), 54(c).

4. Appeal and Error ⇐931(1)

Appellate court would have to review evidence, and every inference and intendment fairly arising therefrom, in light most favorable to party prevailing below.[3]

5. Partnership ⇐34

One who has, by words or conduct, represented himself, or consented to another's representing him, to be partner is liable to those who have on faith thereof advanced materials, money or credit to partnership; and this is so even though, as between them, no real partnership exists. U.C.A.1953, 48-1-13.

6. Partnership ⇐56

In action brought by materialmen against lessor, lessee, and alleged partner of lessee in operation of club in building built on leased premises with materials furnished by plaintiffs, evidence would support finding that lessee had held himself out as a partner of third defendant in operation of club.

7. Mechanics' Liens ⇐58, 191

A lessee is an "owner," within meaning of mechanics' lien statutes, and his interest is subject to lien for improvements made under contract with him.

See publication Words and Phrases, for other judicial constructions and definitions of "Owner".

8. Mechanics' Liens ⇐191

Lien for improvements made under contract with lessee may attach to, and be enforced against, his leasehold interest, for labor or materials furnished under express or implied contract with lessee.[4]

9. Mechanics' Liens ⇐134

When statutory requirements as to contents of notice of lien are met, it is not essential to validity of mechanics' lien that names of others whose interests might be affected thereby be stated. U.C.A.1953, 38-1-3, 38-1-7.

George H. Searle, Salt Lake City, for appellant.

Dean E. Conder, Delbert M. Draper, Jr., Salt Lake City, for respondents.

CROCKETT, Justice.

Defendant, Harry Hong, appeals from a judgment holding him liable, as a partner, for the cost of improvements on a building leased to him, and foreclosing mechanics' liens on his leasehold. He contends that the finding of partnership is in error: (1) that the issue of partnership was not raised

1. Morris v. Russell, 120 Utah 545, 236 P. 2d 451.
2. National Farmers Union Property & Casualty Co. v. Thompson, 4 Utah 2d 7, 286 P.2d 249.
3. Toomer's Estate v. Union Pac. Ry. Co., 121 Utah 37, 239 P.2d 163; Nasner v. F. G. Burton Co., 2 Utah 2d 236, 272 P. 2d 163.
4. Ellis v. Brisacher, 8 Utah 108, 29 P. 879; Eccles Lumber Co. v. Martin, 31 Utah 211, 87 P. 713.

by the pleadings, and (2) that such finding is not supported by the evidence. He also contends that the mechanics' liens cannot be foreclosed against his leasehold interest.

Defendant Nick Glezos is the owner of a cafe located at 3793 South State Street in Salt Lake City. On December 1, 1953, he leased it to defendant Harry Hong for a period of six years at a monthly rental of $250. Hong operated on the premises a cafe known as The Golden Pheasant. During the year 1954 Hong was approached by defendant C. C. McDermond, who was desirous of taking over the premises and buying Hong's interest, when and if he could raise the money. Hong introduced McDermond to Glezos, the owner, who thereafter gave McDermond and Hong permission to build an addition to the building, such addition to be used as a private club. Hong told Glezos that he intended to become a partner with McDermond in the operation of the club, and he later told others that he was in fact a partner with McDermond and others in the building project. Materials for the construction of the new addition were furnished by plaintiffs Buehner Block and South State Builders' Supply at the instance of McDermond.

At the time the materials were ordered there was some concern on the part of plaintiff Buehner Block Company as to exactly who would pay for them. When its credit manager questioned McDermond on this point he referred him to Hong who told the credit manager that he (Hong) would pay for the materials after he got the money from McDermond. Hong was in possession of the premises; was present during parts of the construction and was aware of the delivery and use of the materials from these plaintiffs. In fact, the proof shows that he paid for parts of the construction with his own money. From the time construction was completed in November, 1954, until November, 1955, Hong received $250 per month rent from operations of the new club. At this time he and Glezos, by mutual agreement, terminated their original lease, initiating a new one by which Hong leased only the old part of the building.

Meanwhile the plaintiffs, Buehner Block Company and South State Builders' Supply Company had been making unsuccessful attempts to collect for the materials furnished and had each filed notice of lien on the premises. They separately commenced actions against Hong, Glezos and McDermond seeking: (1) To foreclose the liens against the property, and (2) to hold each defendant liable for the materials. The two causes were joined for trial. The actions were dismissed as to Glezos. Default judgments were taken against McDermond. After a trial the court found that Hong was a partner of McDermond in the building project and entered judgment against him for the value of the materials furnished, and foreclosed the liens against his leasehold.

[1-3] Directing attention to the claimed error in finding partnership liability when such issue was not raised in the pleadings: Rule 15(b) and Rule 54(c) of the Utah Rules of Civil Procedure bear upon this problem. They provide in essence that even though issues are not raised by the pleadings, if they are tried by express or implied consent of the parties, a final judgment can be rendered on such issues. But, as this court has held on prior occasions, the adverse party should be given the benefit of every doubt. He must not have been misled nor in any way prejudiced by the introduction of the new issues.[1] As we recently declared:

> "Notwithstanding all of our efforts to eliminate technicalities and liberalize procedure, we must not lose sight of the cardinal principle that under our system of justice, if an issue is to be tried and a party's rights concluded with respect thereto, he must have notice thereof and an opportunity to meet it."[2]

1. Morris v. Russell, 120 Utah 545, 236 P. 2d 451, 26 A.L.R.2d 947.

2. National Farmers Union Property & Casualty Co. v. Thompson, 4 Utah 2d 7,

There is no indication in the instant case that the defendant was surprised or misled by the introduction of the partnership issue. It was raised during the trial without objection on his part, and both sides went into the facts as to whether a partnership was shown. Under such circumstances the fact that the issue was not formally raised by the pleadings or by motion to amend does not vitiate a finding on such issue

[4–6] This brings us to the question whether the evidence supports the finding of partnership. The trial court having found in favor of the plaintiffs, we are obliged to review the evidence and every inference and intendment fairly arising therefrom in light most favorable to them [3]

Under the Uniform Partnership Act one subjects himself to partnership liability by words or conduct representing himself, or consenting to another's representing him, to anyone as a partner [4] He is liable to those who have on the faith thereof advanced materials, money or credit to the partnership, and this is so even though as between them no real partnership exists [5] The facts that Mr Hong stated to Glezos and others that he was or intended to become a partner; that when plaintiff's credit manager inquired as to who would pay for the materials, Hong gave him assurance that he would pay as soon as he received the money from McDermond, that Hong did in fact pay for some of the construction costs by his own check, and further that he was present when the materials were being delivered and used in the construction on the premises where he was operating The Golden Pheasant Cafe, all combine to provide ample basis for the finding that he held himself out as a partner of McDermond in the transaction.

[7, 8] As to defendant's contention that the mechanics' liens could not be foreclosed against his interest, it is well settled that a lessee is an owner within the meaning of the mechanics' lien statutes, and his interest is subject to a lien for improvements made under a contract with him. [6] This lien may attach to and be enforced against his leasehold estate for labor or materials furnished under an express or implied contract with the lessee [7]

[9] A further assault upon the lien by Mr Hong is that it was not effective against him nor his interest in the property because his name was not listed on the notices of lien This contention is without merit. The lien attaches to the property [8] All the statute requires is that the notice of lien contain the name of the owner, if known, the person to whom the labor or materials was furnished, the terms of the contract; the dates when the first and last materials were furnished, a description of the property, and a statement of the lienor's demand [9] When these requirements are met it is not essential to the validity of the lien that the names of others whose interests might be affected thereby be stated Indeed in many instances such knowledge might be unavailable to the lienor and such requirement could defeat his claim of lien The purpose of recordation of the notice of lien is to give notice thereof to

13, 286 P 2d 249, 253 See also Taylor v E. M Royle Corp, 1 Utah 2d 175, 264 P 2d 279

3. Toomer's Estate v Union Pac Ry. Co, 121 Utah 37, 239 P 2d 163, Nasner v F G Burton Co, 2 Utah 2d 236, 272 P 2d 163

4. Sec 48–1–13, U C A. 1953.

5. Gustafson v. Taber, 125 Mont 225, 234 P 2d 471.

6. 57 C J.S Mechanics' Liens § 65(b), p. 558

7. Ellis v. Brisacher, 8 Utah 108, 29 P. 879 See also Eccles Lumber Co v. Martin, 31 Utah 241, 87 P. 713, National Gas Co v Ada Iron & Metal Co, 185 Okl 115 93 P 2d 529; Archibald v Iacopi, 120 Cal App 2d 666, 262 P 2d 40, Horn v Clark Hardware Co, 54 Colo 522, 131 P. 405, 45 L.R.A., N S, 100.

8. Sec 38–1–3, U C A 1953: "Contractors, * * * shall have a lien upon the property upon or concerning which they have rendered service, performed labor or furnished materials * * *."

9 Sec 38–1–7, U C A 1953.

all persons who may be affected thereby. Particularly in this case defendant Hong has no basis for complaint on this ground because he had actual notice of the entire transaction; the facts that the materials were delivered and used for construction on the premises he was in possession of, and the concern plaintiffs had about payment for their materials.

Other errors are assigned which we do not deem of sufficient importance to warrant discussion.

Affirmed.

McDONOUGH, C. J., and WADE, WORTHEN and HENRIOD, JJ., concur.

6 Utah 2d 231

Flora M. ROBISON, Plaintiff and Respondent,

v.

Pete WILLDEN, a minor, by and through his Guardian ad litem Marvell Willden, and Marvell Willden, Defendants and Appellants.

No. 8597.

Supreme Court of Utah.

May 1, 1957.

Action by automobile passenger for personal injuries sustained in collision between automobile which she was riding and vehicle being driven by one of the defendants. The Third Judicial District Court, Salt Lake County, A. H. Ellett, J., entered judgment for passenger and defendants appealed. The Supreme Court, Wade, J., held that evidence was sufficient to sustain finding that defendant driver was guilty of negligence for failure to keep a proper lookout and to yield right of way to opposite direction driver making a left-hand turn at intersection and that such negligence was a proximate cause of the injuries.

Affirmed.

Automobiles ⇐244(11, 36)

In passenger's action for personal injuries sustained in collision between automobile in which she was riding and vehicle being driven in opposite direction upon same highway by one of the defendants, evidence sustained finding that defendant driver was negligent in failing to keep a proper lookout and to yield right of way to automobile making a left-hand turn at intersection and such negligence was the proximate cause of injuries.[1]

L. E. Midgley, Salt Lake City, for appellants.

Woodrow D. White, Salt Lake City, for respondent.

WADE, Justice.

Appeal from a judgment granted by the court sitting as the trier of the facts in favor of Flora M. Robison, for injuries sustained in a collision between an automobile being driven by her husband in which she was a guest, and a car owned by Marvell Willden and being driven by her son, Pete Willden, defendants below and appellants herein.

The question we have to decide is whether the evidence was insufficient as a matter of law to sustain the findings that Pete Willden was negligent and that such negligence was a proximate cause of the accident in which plaintiff's injuries were received.

The record discloses that the accident occurred at the intersection of Fifth East Street with Hawthorne Avenue in Salt Lake City, Utah. Fifth East Street is a four-lane highway running in a northerly and southerly direction. Its lanes are separated for opposite bound traffic by yellow painted double lines in its center. It also has park-

1. Cederloff v. Whited, 110 Utah 45, 169 P.2d 777; Martin v. Stevens, 121 Utah 484, 243 P.2d 747.

generally prohibit combinations which attempt to control prices, including the costs of professional services. This argument was not presented or discussed below, but is first urged on appeal. It is generally held, and this court has so held, that matters not raised in the trial court will not be considered on appeal.[1] There does not appear to be any reason to depart from this rule under the facts of the present case.

[2] Defendants next contend that the sales contract provision quoted above which automatically provides the realtor with a 6% commission even though the owners themselves sell the property during the contract period, is a penalty and unenforceable, and that the proper measure of liability of defendants to plaintiff is the actual value of services rendered by plaintiff under the contract.

In view of defendants' emphasis on the question of penalties and liquidated damages, it is well to observe at the outset that liability sought to be imposed on the seller herein is essentially in fulfillment of the obligations created by the contract rather than in the form of liquidated damages for the breach thereof. The contract was entered into for the purpose of effecting a sale of the property, which purpose was accomplished. Likewise the contract clearly provided that if the owner made the sale, the realtor was to receive the stated commission.

In Andreason v. Hansen [2] this court said:

> "[I]t is to be kept firmly in mind, that the courts recognize the rights of parties freely to contract and are extremely reluctant to do anything which will fail to give full recognition to such rights."

Defendants do not argue that there was fraud or any other factor which renders the contract void, nor that the seller did not understand the provision covering the payment of the commission. Recognizing the importance of the right to contract, and under the circumstances of this case, we are reluctant to alter the terms agreed upon in the contract.

Moreover, the type of "exclusive right to sell" real estate listing involved in this action has been universally upheld.[3] The nature of the real estate business, wherein the broker is paid only if a sale is made, would seem to make the contract provision here in question a reasonable one.

Affirmed. Costs to plaintiff.

HENRIOD, C. J., and CROCKETT, CALLISTER and WADE, JJ., concur.

1. Huber v. Deep Creek Irrigation Co., 6 Utah 2d 15, 305 P.2d 478 (1956); Radley v. Smith, 6 Utah 2d 314, 313 P.2d 465 (1957); 4 C.J.S. Appeal and Error § 233.

2. 8 Utah 2d 370, 335 P.2d 404 (1959). See also Peck v. Judd, 7 Utah 2d 420, 326 P.2d 712 (1958); Cole v. Parker, 5 Utah 2d 263, 300 P.2d 623 (1956).

3. Anno., 64 A.L.R. 395, particularly Section IV, p. 416; 12 C.J.S. Brokers § 94. The following Utah cases support the general rule: Frederick May & Co. v. Dunn, 13 Utah 2d 40, 368 P.2d 266 (1962); Lewis v. Dahl, 108 Utah 486, 161 P.2d 362, 160 A.L.R. 1040 (1945).

14 Utah 2d 205

A. H. CHENEY and Harold S. Peterson, Plaintiffs and Respondents, and Cross-Appellants,

v.

W. R. RUCKER and Addie W. Rucker, Defendants and Appellants.

No. 9646.

Supreme Court of Utah.

May 1, 1963.

Action by assignee of accounts of corporate broker to recover for broker's services in arranging trade of owners' property. The First District Court, Box Elder

County, Lewis Jones, J., rejected claim that assignee was entitled to $4,750 as provided by earnest money agreement and granted him judgment of $3,500 based on a subsequent agreement, and defendants appealed and plaintiff cross-appealed. Notice of defendants' appeal was dismissed. The Supreme Court, Crockett, J., held that parties who have rights under existing contract have same power to renegotiate terms or waive those rights as they had to make the contract and that evidence supported finding that subsequent contract which was made before any commission had become due and while there was uncertainty whether the trade had developed into binding transaction was supported by adequate consideration.

Affirmed.

Henriod, C. J., and Callister, J., dissented.

1. Brokers ⇐40

Corporate broker and property owner who had entered into earnest money agreement which had not dealt with payment of broker's commission but only with percentage to be paid had right to make second agreement to set down in writing the method of payment.

2. Brokers ⇐40

Agreement between corporate broker and owners on method of payment of prior agreed on commission for arrangement of trade of realty arose out of and related to same transaction as the prior agreement and would be viewed as part thereof, and no new consideration was necessary to support the agreement as to method of payment.

3. Appeal and Error ⇐934(1)

Judgment was endowed with presumption of validity.

4. Appeal and Error ⇐901

Party attacking judgment had burden of affirmatively showing judgment to be in error.

5. Appeal and Error ⇐931(1)

Evidence and all inferences that fairly and reasonably might be drawn therefrom were required to be viewed in light most favorable to judgment in non-jury case.

6. Contracts ⇐236, 256

Parties who have rights under existing contract have same power to renegotiate terms or waive those rights as they had to make the contract.

7. Appeal and Error ⇐994(3)

Credibility of testimony was for finder of facts.

8. Brokers ⇐85(1)

In absence of express language making payment of $3,500 to broker within particular time condition to validity of contract providing that it superseded any other agreement, trial court entertaining action by broker's assignee for $4,750 under prior agreement properly considered evidence relating to background and circumstances to determine if agreement to accept $3,500 was supported by new consideration.

9. Brokers ⇐86(8)

Evidence supported finding that contract which required owners to pay $3,500 real estate broker's commission in lump sum rather than $4,750 payable by installments under previous contract and which was made before any commission had become due and while there was some uncertainty as to whether realty trade had developed into a binding transaction was supported by adequate consideration, as claimed by owners sued for the $4,750.

10. Contracts ⇐237(2)

Settlement of dispute provides consideration which will support a contract changing the terms of a prior contract.

11. Assignments ⇐73

Assignee of account of broker could have nothing more than assignor had and was bound by any waiver, relinquishment, or change which had occurred in broker's rights by virtue of execution of new agreement before assignment.

12. Pleading ⇐87

Purpose of rule requiring pleading of affirmative defenses is to have issues to be tried fairly framed. Rules of Civil Procedure, rule 8(c).

13. Courts ⇐85(2)

All the rules of procedure must be looked to in light of their fundamental purpose of liberalizing both pleading and procedure to end that litigants are afforded privilege of presenting whatever legitimate contentions they have.

14. Pleading ⇐370

Litigants are entitled to notice of issues raised and opportunity to meet them.

15. Novation ⇐11

Notwithstanding failure to plead subsequent agreement as affirmative defense to action on prior agreement and objection to evidence on issue of subsequent agreement by plaintiff who made no request for continuance or representation of surprise or other disadvantage, permitting defendant to raise the issue was not abuse of discretion. Rules of Civil Procedure, rules 8(c), 15(b), 54(c) (1).

George M. Mason, Brigham City, for defendants and appellants.

George B Handy, Ogden, for plaintiffs and respondents and cross-appellants.

CROCKETT, Justice.

Plaintiff A. H. Cheney, assignee of certain accounts of Real Estate Exchange, Inc., sued to recover for broker's services the latter had rendered defendants in arranging a trade of their motel property for a dairy farm. The trial court rejected plaintiff's claim that he was entitled to 5% on the $95,000 value of the property, totalling $4,750, as provided by an earnest money agreement, but granted him judgment for $3,500 based upon a subsequent agreement. Defendants' attorney filed a notice of appeal, which was later dismissed. We are concerned only with plaintiff's cross-appeal in which he insists on entitlement to the full $4,750.

On March 14, 1957, the defendants Rucker signed the earnest money agreement which committed them to "pay 5% commission on *transfer of the property* * * *." Two days later, March 16, 1957, in negotiating with respect to this transaction, another contract was signed which detailed the manner of payment: that the Ruckers would execute a note for the major portion of the commission, $4,250, payable at the rate of $200.00 per month to be secured by a chattel mortgage, or by an assignment of part of the monthly milk check expected from the operation of the dairy farm; and that these payments were to begin 30 days after the Ruckers took possession of the farm.

[1, 2] It will be noted that the earnest money agreement had not dealt with the method of payment, but only with the percentage to be paid. The parties certainly had the right to make a second agreement, as they did, to set down in writing the method of payment. This second contract arose out of and related to the same transaction as the first and would therefore be viewed as part of it.[1] Under such circumstances there is no necessity to be concerned with new consideration because it is provided by the mutual promises of the parties in connection with the entire transaction.[2]

A little different situation exists with respect to the next contract the parties executed, which is the one upon which judgment was granted. On March 30, 1957, two weeks after the making of the second contract, but still before there had been any *transfer of the property*, the Real Estate Exchange and defendant W. R. Rucker en-

1. "Where two or more written instruments are executed as a part of one transaction such instruments should, when possible, be construed together." Strike v. White, 91 Utah 170, 63 P. 2d 600 (1936); Freedland v. Greco, 45 Cal.2d 462, 289 P.2d 463 (1955).

2. Davis v. City of Okmulgee, 174 Okl. 429, 50 P.2d 315 (1935).

tered into a third contract relating to the commission as follows:

"This commission *agreement supersedes and replaces any other agreement whatsoever* in regard to the commission that is to be paid on the sale of the Shady Lane Motel, home and fourplex owned by Mr. W. R. Rucker.

"We the undersigned Real Estate Exchange agree to accept as full payment and I the undersigned W. R. Rucker agree to pay a cash commission of $3,500.00 to said Real Estate Exchange.

"In mutual agreement whereof we have signed this agreement this 30 day of March 1957.

"[Signatures]"

About two months later, Real Estate Exchange brought suit to recover the $3,500 provided for in this third agreement. That action was later dismissed without prejudice. This account, together with others, was assigned to the plaintiff Cheney, who brought the instant suit, in which he did not limit his claim to the $3,500, but asked for the full 5% of the value of the property on the basis of the earnest money agreement, amounting to $4,750.

[3-5] In considering the soundness of the trial court's conclusion and judgment that the third contract was valid, certain cardinal rules must be kept in mind: that the judgment is endowed with a presumption of validity; that the party attacking it has the burden of affirmatively showing that it is in error; and that the evidence and all inferences that fairly and reasonably may be drawn therefrom must be viewed in the light most favorable to it.[3]

[6] It is fundamental that where parties have rights under an existing contract they have exactly the same power to renegotiate terms or to waive such rights as they had to make the contract in the first place. As stated by Justice Wade for this court in Davis v. Payne & Day, Inc.:[4]

"It is a well-established rule of law that parties to a written contract may modify, waive, or make new terms * * *."

And this was held to be so notwithstanding terms in that contract designed to hamper such freedom. (Citing authorities.)

[7] There may have been some merit in plaintiff's contention that he was entitled to rescind the third contract and sue on the earnest money agreement if the trial court had believed that the third contract was conditioned upon immediate performance.[5] But there is nothing in the wording of that contract expressly so stating; and the trial court did not believe Mr. Cheney's testimony to that effect, as was its prerogative.[6]

[8, 9] In the absence of express language in the contract making the payment of the $3,500 within a particular time a condition to its validity, it was entirely proper for the trial court to look at the evidence relating to the background and circumstances to determine what was intended in that regard and whether the agreement to accept $3,500 in cash was supported by some new consideration, as it concededly must be.[7] In doing so it could reasonably regard the evidence as showing adequate consideration and as sustaining the view that the parties intended the third contract to replace the prior commission agreements.

[10] This third contract was entered into before any commission had become due because there had been no "transfer of the property" as the earnest money agreement required. Further, it is apparent that there was at least some uncertainty as to whether

3. Charlton v. Hackett, 11 Utah 2d 389, 360 P.2d 176 (1961).

4. 10 Utah 2d 53, 348 P.2d 337 (1960).

5. See 1 Am.Jur.2d pp. 344-46; also 15 C.J.S. Compromise and Settlement § 46, p. 769.

6. Page v. Federal Security Ins. Co., 8 Utah 2d 226, 332 P.2d 666 (1958).

7. See: Bamberger Co. v. Certified Productions, 88 Utah 194, 48 P.2d 489 (1935); Nordfors v. Knight, 90 Utah 114, 60 P.2d 1115 (1936); and 12 Am. Jur. p. 988.

the trade of the Ruckers' property to the Nielsens had been developed into a binding transaction. This was not in fact determined until disputes between them were resolved by the final termination of a lawsuit many months later.[8] In addition, Real Estate Exchange had agreed to accept the broker's fee in payments of $200.00 per month extending over a period of two years. They were not to begin until 30 days after Ruckers took possession of the dairy farm, which had not occurred.

In view of those uncertainties, the Real Estate Exchange could very well have regarded this third contract, which gave it a definite promise of $3,500 in a lump sum, as more desirable than the claims it theretofore had. It certainly must have thought so, otherwise it would not have entered into such a contract. It is also true that the new agreement bound the Ruckers to a different obligation and one which would probably be more burdensome to them. Thus, there is no difficulty to be encountered in finding this new contract a benefit to the Real Estate Exchange and a detriment to the defendant. This provides adequate new consideration for this third agreement and makes it binding on both.[9]

Since this third contract was valid at the time it was made, the question which must be confronted and answered is this: What justification is there for the plaintiff, assignee of Real Estate Exchange, to rescind it and go back to the original earnest money agreement? We think the trial court correctly concluded that there was none. It was not at all unreasonable for it to suppose that if the parties had intended that this third agreement should be valid only if the $3,500 was paid immediately, or within some particular time, they would have said so. It is of especial significance that they did not say so; and that the agreement did not make *payment* a condition to its validity, but plainly indicates that it was the "*agreement* * * * to pay a cash commission of $3,500 * * *" which was intended to "supersede and replace any other agreement whatsoever." The view of the trial court that the Real Estate Exchange accepted this *agreement* to pay a lump sum, rather than any requirement of immediate payment, in lieu of its prior claims, is not unreasonable in the light of the evidence, nor is the view that the acceptance of such an *agreement* constitutes an accord and satisfaction.[10]

That the parties intended the new contract to be unconditionally binding upon them and to supplant their prior agreements is persuasively supported by the fact that the Real Estate Exchange and its attorney regarded and treated the new contract as valid when it brought suit for the $3,500 based on it. If the understanding had been that the new agreement was to be conditioned upon payment by the Ruckers of that amount in cash forthwith or within any set time, it is only logical that the Real

8. Nielsen v. Rucker, 8 Utah 2d 302, 33 P.2d 1067 (1959); that settlement of dispute provides consideration, see Browning v. Equitable Life Assur. Soc. of United States, 94 Utah 532, 72 P.2d 1060 (1937); State for Use and Benefit of McBride v. Campbell Bldg. Co., et al., 94 Utah 326, 77 P.2d 341 (1938); Ralph A. Badger & Co. v. Fidelity Bldg. and Loan Ass'n, 94 Utah 97, 75 P.2d 669 (1938); Ashton v. Skeen, 85 Utah 489, 39 P.2d 1073 (1935); Gray v. Bullen, 50 Utah 270, 167 P. 683 (1917); Smoot v. Checketts, 41 Utah 211, 125 P. 412 (1912).

9. Williams v. Peterson, 86 Utah 526, 46 P.2d 674 (1935); see also: Allen v. Rose Park Pharmacy, 120 Utah 608, 237 P. 2d 823 (1951); Latimer v. Holladay, 103 Utah 152, 134 P.2d 183 (1943); Utah Nat. Bank of Salt Lake City v. Nelson, 38 Utah 169, 111 P. 907 (1910).

10. A distinction is sometimes made between situations where *payment or performance* is a condition to the accord and satisfaction, and where the *new promise* is accepted as the accord and satisfaction. See 1 Am.Jur.2d 1. 347 and authorities therein cited; see also 15 C.J.S. Compromise and Settlement § 46, p. 769; Oholson v. Steinhauser, 218 Or. 532, 315 P.2d 136, 346 P.2d 87 (1959); and French v. Commercial Credit Co., 99 Colo. 447, 64 P.2d 127 (1936).

Estate Exchange would have repudiated the new contract because of the failure of payment, and would have claimed the full 5%, or $4,750, instead of $3,500 as it did. This court stated in the case of Jenkins v. Jensen, et al.:[11] "Where the language used by the parties to a contract is indefinite * * the practical construction [given by] the parties themselves is entitled to great, if not controlling, influence."

[11] It is elementary that plaintiff Cheney, as assignee of Real Estate Exchange, could have nothing more than his assignor and is bound by any waiver, relinquishment or change of its rights which had occurred by virtue of its execution of the new agreement.

[12-15] Plaintiff also raises the procedural point that since defendants did not plead the subsequent agreement as an affirmative defense, they should not have been permitted to rely thereon. It is true, as plaintiff insists, that Rule 8(c), U.R.C.P., requires that affirmative defenses be pleaded. It is a good rule whose purpose is to have the issues to be tried clearly framed. But it is not the only rule in the book of Rules of Civil Procedure. They must all be looked to in the light of their even more fundamental purpose of liberalizing both pleading and procedure to the end that the parties are afforded the privilege of presenting whatever legitimate contentions they have pertaining to their dispute. What they are entitled to is notice of the issues raised and an opportunity to meet them. When this is accomplished, that is all that is required.[12] Our rules provide for liberality to allow examination into and settlement of all issues bearing upon the controversy, but safeguard the rights of the other party to have a reasonable time to meet a new issue if he so requests. Rule 15(b), U.R.C.P., so states. It further allows for an amendment to conform to the proof after trial or even after judgment, and indicates that if the ends of justice so require, "failure so to amend does not affect the result of the trial of these issues." This idea is confirmed by Rule 54(c) (1), U.R.C.P.: "[E]very final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

Although the plaintiff did object to evidence on the issue of subsequent agreement, when it was overruled, he made no request for a continuance nor did he make any representation to the court that he was taken by surprise or otherwise at a disadvantage in meeting that issue. The trial court not only did not abuse his discretion in allowing the issue to be raised and receiving the contract in evidence, but he would have failed the plain mandate of justice had he refused to do so.

Judgment affirmed. No costs awarded.

McDONOUGH and WADE, JJ., concur.

HENRIOD, Chief Justice (dissenting).

I dissent. There were three writings between the parties. The first dated March 14, 1957, was a valid contract, supported by consideration; the second, dated March 16, 1957 had to do with method of payment, which could be justified and binding, perhaps, since it simply implemented the first, with respect to mode of payment,—*not* as to the principal obligation. The third instrument in writing, dated March 30, 1957, purported to reduce the primary obligation by $1,250 if payment were made in cash instead of on protracted terms. It was loosely drawn, recited no consideration or any definite time for payment. Defendants did not respond to this or any of the other written instruments and refused to recognize either for several alleged reasons, including fraud in the inception,—and that was their defense in Nielsen v. Rucker,[1] —a position we rejected.

11. 24 Utah 108, 66 P. 773 (1901).

12. See Taylor v. E. M. Royle Corporation, 1 Utah 2d 175, 264 P.2d 279.

1. 8 Utah 2d 302, 333 P.2d 1067 (1959).

A suit was filed based on the third document ($3,500), but it was dismissed on motion of the plaintiff *without prejudice*, after which the present litigation was launched based on the initial earnest money agreement ($4,750). The $3,500 suit, therefore, had a status as though it never had been filed. Consequently, it was error to admit the file in that case in the instant case, and greater error to base the $3,500 judgment in the present case on the record in the former. This is particularly true, since defendants in the principal case, after insisting on and procuring admission of the file in the previous case, promptly denied liability thereunder, or under any other alleged contract. Significantly, they did not plead that they owed only $3,500. They pleaded they owed nothing.

Logically, it follows that defendants' contention that there was no obligation at all should have been the only issue in *this* case. The introduction of the file in the $3,500 lawsuit should be held to have been in error. The only matter left was the contention of the cross-appeal for $4,750 on the only clear, consideration-supported document extant in this case.

The defendants appealed the $3,500 judgment and then moved to dismiss their appeal. At that juncture, had there been no cross-appeal, the $3,500 judgment would have been affirmed. There was nothing then left for this court to determine save the merits of the cross-appeal based on the record, which clearly reflects a promise to pay $4,750, without any refutation by defendants, except by an abortive claim of fraud, which we negated in Nielsen v. Rucker, supra.

The main opinion talks of the $3,500 "agreement" and surmises that there *must* have been consideration therefor, else the parties would not have signed it. The consideration is supplied by this court through conjecture and not by any showing in the record of any quid pro quo. Assuming there may have been some question as to consideration, it would have nothing to do with the erroneous admission into evidence at defendants' behest of an alleged $3,500 agreement which defendants themselves claimed to be void. Some other conclusion could have maintained, perhaps, if defendants had taken the position that the $3,500 document was binding to the exclusion of that for $4,750. But they didn't.

The main opinion talks about an accord and satisfaction. This is untenable, since both parties claimed there was no such settlement or agreement. The court presumed to make such an agreement for them over their mutual rejection of such a theory. Besides, under the Rules an accord and satisfaction must be pleaded as an affirmative defense,[2] which was not pleaded, but which was rejected by an untenable defense of fraud that allegedly vitiated not only the $3,500 claim but the two others.

Furthermore, assuming that there might be a question as to the efficacy of the $3,500 document, the only possible conclusion would be that payment should have been made within a reasonable time. Defendants made no offer to comply for 5 years, or at all, which would point up the invalidity of any such contract, which strangely enough both parties emphatically claimed to be invalid and unenforceable.

This case should be remanded with instruction to enter judgment for plaintiff for $4,750, with interest.

CALLISTER, J., concurs in the dissenting opinion of HENRIOD, C. J.

2. Rule 8(c) Utah Rules of Civil Procedure.

Pornography has been and can be successfully prosecuted by conduct which comports with traditionally established rules and under properly drawn ordinances and statutes, but aversion to pornography must not become an instrument to mar our legal system's commitment to a fair trial.

In many trials, civil and criminal, the controversy involves distress, dishonesty, brutality, filth, violence—involves indeed all types of ugly and unpleasant matters. But our system's commitment does not permit imposition of sanctions against even the "hated and despicable" without observing the proper legal processes and standards.

And I do not think that our legal system, which requires these standards, promotes technical nonsense or results in vast futility. It rather aids and solves—in this imperfect world—more than it hinders or fails.

FILLMORE CITY, a Municipal Corporation, Plaintiff and Appellant,

v.

Thomas A. REEVE and Alda E. Reeve, Defendants and Respondents.

No. 14697.

Supreme Court of Utah.

Oct. 31, 1977.

City brought action against landowners to abate and enjoin an alleged nuisance created by keeping of livestock on premises at edge of and partly within city where zoning was for residential purposes only. A preliminary injunction was issued pursuant to which owner sold livestock. The Fifth District Court, Millard County, J. Harlan Burns, J., entered judgment in favor of landowners and the city appealed. The Supreme Court, Crockett, J., held that: (1) there was evidence to support findings that landowners had established a valid nonconforming use, had not kept animals in excess of such nonconforming use and there was no public nuisance; (2) city was not prejudiced under circumstances by failure of landowners to file a motion or counterclaim for damages after dissolution of preliminary injunction, and (3) trial court did not err in permitting expert to testify as to damages suffered by landowners in forced sale of livestock.

Affirmed.

1. Zoning ⇐786, 788

Where violation of zoning ordinance is shown, burden of proof is on violator to prove by preponderance of evidence a preexisting nonconforming use, but when the nonconforming use is established then burden of proof is reversed and is on government to prove that landowner violated zoning ordinance by exceeding his established nonconforming use.

2. Appeal and Error ⇐931(1)

Where evidence is in conflict, Supreme Court assumes that trial court believed those aspects of evidence that support his findings.

3. Zoning ⇐788

In action by city to abate and enjoin an alleged nuisance created by landowners in keeping pigs, cattle and horses on premises at edge of and partly within city limits where zoning was for residential use only, there was evidence to support findings that landowners had established a nonconforming use entitling them to keep livestock on premises, that the animals were not kept in excess of any nonconforming use and there was no public nuisance.

4. Injunction ⇐241

Rule relating to posting of security as condition to issuance of restraining order or preliminary injunction eliminates necessity of independent action by aggrieved party to recover damages upon dissolution of injunction by providing that liability on surety bond may be enforced on motion, this does

not normally eliminate necessity of giving adverse party some notice and opportunity to meet that issue by filing a motion or counterclaim for such relief. Rules of Civil Procedure, rule 65A(c).

5. Appeal and Error ⇐204(2)

Where city, seeking to abate nuisance, stipulated that a $6,000 bond would be filed by city to indemnify landowners for any damages which would inure to them because of removal of livestock under preliminary injunction, city was not prejudiced by failure of landowners, found to have a valid nonconforming use, to file a motion or counterclaim for damages after dissolution of preliminary injunction after which evidence was introduced, without objection, as to damages to landowners because of a forced sale of livestock, and city was precluded from claiming error in this regard. Rules of Civil Procedure, rule 65A(c).

6. Evidence ⇐536, 546

If witness has specialized knowledge in field to extent that his testimony can be helpful to jury on matters with which they personally are not familiar, his testimony may be received as an expert, and whether he is so qualified rests within sound discretion of trial court.

7. Evidence ⇐548

Trial court did not err in permitting a qualified expert in the raising and management of livestock, to testify as to losses suffered by landowners, compelled to make a forced sale of livestock pursuant to preliminary injunction obtained by city in action to abate nuisance, notwithstanding claim that such witness did not have first-hand knowledge of landowners' operation.

Dexter L. Anderson, Fillmore, for plaintiff and appellant.

Eldon A. Eliason, Delta, for defendants and respondents.

CROCKETT, Justice:

Fillmore City brought this action to abate and enjoin an alleged nuisance created by the defendants in keeping pigs and cattle and horses on premises at the edge of and partly within its city limits where the zoning was only for residential use. Defendants denied the charge of nuisance and affirmatively alleged a right to keep livestock on the premises because of a prior established non-conforming use, which was expressly exempted by the zoning ordinance.[1]

On November 11, 1974, at a hearing on an order to show cause why a preliminary injunction should not be issued, the parties entered into stipulations that if injunctive relief was granted and if the defendants' claim of non-conforming use was later found to be valid, the defendants would be entitled to damages resulting from their compliance with the order. They further stipulated that a $6,000 bond would be filed by the plaintiff to indemnify the defendants for any damages that would inure to them because of the removal of their livestock.[2] In consequence of the foregoing, the court made an order that the defendants remove their livestock from the premises within fifteen days. The defendants complied and sold their stock, partly by private sale and partly through the Delta Livestock Auction.

At the trial on March 3–4, 1975, evidence was presented that dating back twenty years or more the defendants (or others, including their lessees) had kept varying numbers of pigs, sheep, cattle and horses on the premises. From those facts the court concluded that the defendants had established the claimed non-conforming use. Further, on the basis of the evidence, including that there was nothing abnormally filthy or offensive about the manner of

1. The zoning ordinances in question became effective January 5, 1972. Section 4.200 provides: "Except as hereinafter specified, any use lawfully existing at the time of enactment of this ordinance may be continued even though such use does not conform with the provisions of this ordinance for the district in which it is located."

2. Even though Rule 65A(c), U.R.C.P., provides that no security is required of a subdivision of the state, plaintiff City so stipulated.

keeping the livestock, the court also ruled against the plaintiff on its contention of public nuisance.

The court having thus found the issues in favor of the defendants as to the keeping of the livestock, proceeded to hear evidence as to the damages suffered by the defendants because they had had to sell their stock in a hurry at forced sale and upon a depressed market, rather than to "feed them out" and sell them when they were in a finished condition and upon a more favorable market. Upon the basis of the testimony of a Mr. Don Evans, who qualified as an expert in the raising and management of livestock, and who testified to the losses thus suffered by the defendants, the trial court computed their loss, plus interest thereon to the time of judgment, totaling the $2,470 he awarded to them.

This appeal is by the plaintiff, Fillmore City. In attacking the judgment it argues that the trial court erred

(1) in finding that the defendant had established a non-conforming use; and in refusing to find that it had kept animals in excess of any such non-conforming use;

(2) in failing to find that there was a public nuisance;

(3) awarding damages when the defendants had failed to plead or counterclaim therefor; and

(4) awarding damages without any foundation in competent evidence.

[1] As to (1) above: we agree that where the violation of a zoning ordinance is shown, the burden of proof is on the violator to prove by preponderance of the evidence a pre-existing non-conforming use. However, when the non-conforming use is established, the burden of proof is reversed. It is then on the city to prove that the defendant violated the zoning ordinance by exceeding his established non-conforming use.

[2–4] With respect to issues (1) and (2), we follow the standard rule of review, that where the evidence is in conflict, we assume that the trial court believed those aspects of the evidence that support his findings.[3] In the interest of brevity, we omit any further detail of the evidence, but deem it sufficient to say that in applying the rules just stated, there is a basis therein to support the findings.

In regard to issue (3) stated above, Rule 65A(c) U.R.C.P. states that:

> . . . no restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

It is true that in particular circumstances this Court has held that upon the dissolution of an injunction the aggrieved party should resort to an independent action to recover damages.[4] However, that rule eliminates the necessity of an independent action by further providing that liability on the surety bond "may be enforced on motion without the necessity of an independent action on the bond." This of course does not normally eliminate the necessity of giving the adverse party (plaintiff here) some notice and an opportunity to meet that issue by filing a motion or a counterclaim for such relief.

[5] Although it is true that there was no such motion or counterclaim filed, plaintiff City has no justifiable cause for complaint in this instance for several reasons. The first is its own stipulation that if at the trial the defendants were found to have a non-conforming use they would be entitled to damages resulting from the injunction. Coupled with this are these important additional facts: that evidence on the subject of damages was presented without any objection from the plaintiff; that its counsel

3. *First Security Bank v. Wright*, Utah, 521 P.2d 563 (1974); *Hardy v. Hendrickson*, 27 Utah 2d 251, 495 P.2d 28 (1972).

4. *Junction Irrigation Co. v. Snow*, 101 Utah [illegible], 118 P.2d 130 (1941). See also *City of Wichita v. Krauss*, 190 Kan. 635, 378 P.2d 75 (1963); 42 Am.Jur.2d, Injunctions, Section 383.

made no representation to the court that he was surprised or put at any disadvantage in meeting that issue; and that he did not ask for any continuance for that purpose. Under such circumstances the city is now precluded from claiming error in that regard.[5]

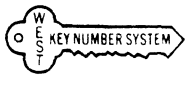
[6] In regard to issue (4), a distinction should be noted between the statement just made above: that plaintiff made no objection to the presentation of evidence relating to damages, and the objection it did make to the testimony of Mr. Don Evans, on the ground of his failure to qualify as an expert and his lack of actual knowledge of defendant's premises and keeping of livestock. The basic rules are: that if the witness has specialized knowledge in the field to the extent that his testimony can be helpful to the jury on matters with which lay persons are not familiar, his testimony can be received as an expert;[6] and that whether he is so qualified rests within the sound discretion of the trial court.[7]

[7] In regard to the plaintiff's specific objection that Mr. Evans did not have first-hand knowledge of the defendants' operation and therefore should not have been permitted to testify, that objection is without merit because the expert does not need to have any such specific knowledge and he did not pretend that he did so. His testimony was as to matters that would apply to any similar situation.

We have found no prejudicial error and therefore no basis for disturbing the findings and judgment.

Affirmed. No costs awarded.

ELLETT, C. J., and MAUGHAN, WILKINS and HALL, JJ., concur.



5. That this is true, see *Taylor v. E. M. Royle Corp.*, 1 Utah 2d 173, 264 P.2d 279, *Cheney v. Rucker*, 14 Utah 2d 205, 381 P.2d 86

STATE of Utah, in the Interest of Tamara SUMMERS and Tina Summers,

v.

Beatrice WULFFENSTEIN, Appellant.

No. 15141.

Supreme Court of Utah.

Nov. 2, 1977.

Paternal grandmother appealed from order of the juvenile court, Salt Lake County, John Farr Larson, J., which summarily dismissed petition by which she sought custody of her two granddaughters. The Supreme Court, Maughan, J., held that: (1) paternal grandmother was entitled to hearing to determine her fitness as custodian for her grandchildren after their mother died and parental rights of their father were terminated and the children were placed in the custody of the Division of Family Services, and (2) juvenile court had jurisdiction over the petition.

Reversed and remanded.

Ellett, C. J., dissented.

1. Infants ⇐19.3(3)

Paternal grandmother was entitled to hearing to determine her fitness as a custodian for grandchildren after the children's mother died and parental rights of the father were terminated.

2. Infants ⇐19.1

One of the attributes of legal custody is the right to determine where and with whom a child shall live. U.C.A.1953, 55-10-64(7).

3. Infants ⇐18

Vesting of legal custody in Division of Family Services is analogous to placing the

6. *Hooper v. General Motors Corp.*, 123 Utah 515, 260 P.2d 549 (1953); *Stagmeyer v. Leatham Bros.*, 20 Utah 2d 421, 439 P.2d 279 (1968).

7. *Lamb v. Bangart*, Utah, 525 P.2d 602 (1974).

In its findings of January 19, 1981, the medical panel observed that it had a suspicion that plaintiff was a victim of multiple sclerosis and suggested further testing including spinal fluid studies to try to resolve the question whether the head trauma was causally connected to the exacerbated symptomatology of multiple sclerosis.

Subsequently, plaintiff underwent a spinal fluid determination, which showed a positive test for multiple sclerosis. This information was conveyed to the Commission by Dr. John P. Barbuto, plaintiff's treating neurologist, along with his observation that:

> [T]rama [sic] has been postulated as a mechanism to promote multiple sclerosis. There are certainly many reports to suggest that trauma will exacerbate multiple sclerosis which is already present. However, the debate regarding the etiology of multiple sclerosis has been going on for many years and probably will continue for years in the future. If we wish to avoid the folly of speculation and endless discussion of unresolvable issues, I think we are left with the following basic observation: Terry [plaintiff] was well, he hit his head on the truck, and he then presented with several *objective* neurologic abnormalities. We are not talking about a case of chronic pain syndrome or some other *subjective* problem in this case. We are talking about clear cut, definable, neurologic function loss.... [E]ven though I do not understand the relationship between the trauma and his symptoms, this does not mean that there is no relationship.... [Plaintiff's] history indicated a temporal relationship between the trauma and the onset of symptoms. [Emphasis in original.]

It thus appears that plaintiff had a preexisting condition described as multiple sclerosis and that the issue as to whether the injury to his head had the effect of exacerbating his preexisting condition was squarely presented to the Commission but was left undetermined.

Therefore, we remand to the Commission for the purpose of resolving whether the injury to plaintiff's head had any causal effect upon the exacerbation of his symptomatology of multiple sclerosis. Inasmuch as the medical panel did not have the benefit of the subsequent determination that plaintiff was suffering from a preexisting condition of multiple sclerosis, on remand the Commission should refer that issue to the medical panel for their determination and guidance in resolving the issues.

STEWART, OAKS, HOWE and DURHAM, JJ., concur.

Salli Smith GIRARD, Plaintiff, Respondent, and Cross-Appellant,

v.

Charles L. APPLEBY, Jr., David E. Wood, Don Bjarnson, Catherine R. Appleby, Leone E. Wood, Grace Bjarnson, Steven Alfred, and Beth Alfred, Defendants, Appellants, and Cross-Respondents.

No. 17662.

Supreme Court of Utah.

March 11, 1983.

Cross appeals were taken from a judgment of the Fifth District Court, Washington County, Robert F. Owens, J. pro tem., which was rendered in an action to declare a forfeiture of a lease. The Supreme Court, Hall, C.J., held that: (1) court erred in reopening the case sua sponte for purpose of permitting lessor to present evidence in support of a demand for an award of attorney fees incurred in enforcing the terms of the lease; (2) trial court did not abuse its discretion in denying lessor's motion to amend, which was made the day of trial and which proposed to introduce new and different causes of action, where lesser was unable to state an adequate reason for

the untimeliness of the motion and where lessees contended that they would be prejudiced in their defense; and (3) forfeiture of lease was waived by lessors' acceptance of rental payments following lessees' breach notwithstanding a unilateral reservation that no waiver of defaults would be granted unless in writing and signed by all parties concerned.

Award of attorney fees vacated and set aside and judgment affirmed in all other respects.

1. Trial ⇐66

It lies within sound discretion of trial court to grant a motion to reopen for purpose of taking additional testimony after the case has been submitted but prior to entry of judgment and court should consider such a motion in light of all the circumstances and grant or deny it in interest of fairness and substantial justice.

2. Trial ⇐66

In action to declare a forfeiture of a lease, trial court erred in reopening the case sua sponte for purpose of permitting lessor to present evidence in support of a demand for an award of attorney fees incurred in enforcing the terms of the lease.

3. Pleading ⇐310

While an exhibit may be considered as part of the pleadings to clarify or explain the same, an exhibit to a pleading cannot serve the purpose of supplying necessary material averments and the content of the exhibit is not to be taken as part of the allegations of the pleading itself. Rules Civ.Proc., Rules 8(a), 10(c).

4. Pleading ⇐245(3)

Rule governing amendment of pleadings by leave of court is to be applied with less liberality when the amendments are proposed during or after trial, rather than before trial. Rules Civ.Proc., Rule 15(a).

5. Pleading ⇐236(7)

In action to declare forfeiture of a lease, trial court did not abuse its discretion in denying lessor's motion to amend, which was made the day of trial and which proposed to introduce new and different causes of action, where lesser was unable to state an adequate reason for the untimeliness of the motion and where lessees contended that they would be prejudiced in their defense. Rules Civ.Proc., Rule 15(a).

6. Landlord and Tenant ⇐112(2)

Forfeiture of lease was waived by lessors' acceptance of rental payments following lessees' breach notwithstanding a unilateral reservation that no waiver of defaults would be granted unless in writing and signed by all parties concerned.

Michael D. Hughes, St. George, for defendants, appellants, and cross-respondents.

Ronald B. Boutwell, Hurricane, J. McArthur Wright, John L. Miles, St. George, for plaintiff, respondent, and cross-appellant.

HALL, Chief Justice:

Plaintiffs Genevieve A. Smith, Jesse E. Smith, Beth M. Smith and Salli Smith Girard brought this action to declare forfeiture of a lease on the ground that defendant lessees had failed to furnish liability insurance coverage as required by the terms of the lease. Plaintiffs also sought an injunction restraining defendants from conducting a health spa business on the leased premises until the required insurance coverage was obtained. Defendants stipulated that a temporary injunction might issue, and they also furnished the required insurance coverage. Subsequently, they stipulated that the temporary injunction might be made permanent, and all parties except plaintiff Girard further stipulated to the dismissal of all issues, and that each of the parties should bear their own attorney fees and costs. The trial court accepted the stipulation and entered its order of partial dismissal, and the case proceeded to trial with only Girard as party plaintiff.

On the morning of trial, Girard moved to amend the complaint to include causes of action for waste and for violations of the health and building codes. The court reserved ruling on the motion, but permitted evidence to be presented on those issues.

The complaint contained a demand for an award of attorney fees incurred in enforcing the terms of the lease agreement, but Girard rested her case without presenting any evidence in support thereof, and without reserving the issue.

The case was duly submitted, and in its subsequent written findings, conclusions and judgment, the court ruled, *inter alia*, as follows: 1) denied the motion to amend the complaint, concluding that it was untimely and that the proposed amendment comprised new and different causes of action; 2) set aside its prior order of partial dismissal and joined the other plaintiffs as involuntary defendants, since all plaintiffs, being co-owners, had not agreed on a common course of action to waive the alleged forfeiture; 3) concluded that defendants had breached the insurance covenant of the lease, but that the breach was not of sufficient substance as would justify forfeiture, and that in any event, all plaintiffs had waived the forfeiture by reason of their acceptance of rental payments following the breach; and 4) determined that plaintiffs were entitled to reimbursement for attorney fees incurred in enforcing the insurance covenant, and ordered proof thereof by way of affidavits. On the basis of the affidavits thereafter submitted, the court awarded Girard the sum of $3,487.50 as and for attorney fees.

On this appeal, defendants challenge the award of attorney fees, contending that the court erred in reopening the case *sua sponte* for the purpose of permitting Girard to submit evidence omitted at the time of trial. Girard cross-appeals, contending that the court erred in refusing to consider waste and health code violations as further evidence of breach, and that the court erred in denying her motion to amend the complaint at the time of trial, and erred in ruling that plaintiffs had waived forfeiture by the acceptance of rent.

[1, 2] It lies within the sound discretion of the trial court to grant a motion to reopen for the purpose of taking additional testimony after the case has been submitted but prior to entry of judgment.[1] The court should consider such a motion in light of all the circumstances and grant or deny it in the interest of fairness and substantial justice.[2] However, no such discretion is afforded the court to reopen the case *sua sponte*. Preservation of the integrity of the adversarial system of conducting trials precludes the court from infringing upon counsel's role of advocacy. Counsel is entitled to control the presentation of evidence, and should there be a failure to present evidence on a claim at issue, it is generally viewed as a waiver of the claim.[3]

In the instant case, we are not apprised of the reason Girard saw fit to rest her case without presenting evidence in support of her claim for attorney fees. However, even if it be assumed that it was the result of oversight, the interests of justice are not enhanced when the court exceeds its role as arbiter by reaching out and deciding an issue that would otherwise be dead, it not having been litigated at the time of trial.[4]

Turning now to the merits of the cross-appeal, Girard concedes that the only claim for relief stated in the complaint is the failure to furnish evidence of insurance coverage. Nevertheless, she contends that the "Notice to Cure Defaults" which was attached to the complaint as an exhibit is sufficient to raise the issues of health and business code violations and waste.

[3] Girard relies upon Rule 10(c), Utah Rules of Civil Procedure, which provides, *inter alia*, that an exhibit to a pleading is a part thereof for all purposes. However, the fact that an exhibit becomes a part of the complaint does not satisfy the requirements of Rule 8(a), Utah Rules of Civil Procedure, that a complaint "shall contain (1) a short and plain statement of the claim showing

1. *Lewis v. Porter*, Utah, 556 P.2d 496 (1976)

2. *Id.*, citing 6A Moore's Federal Practice (2d ed.), Sec. 59.04[13] p. 59–37.

3. *Interiors Contracting Inc v Navalco*, Utah, 648 P.2d 1382 (1982)

4. *See Dixon v Stoddard*, Utah, 627 P.2d 83 (1981)

that the pleader is entitled to relief; and (2) a demand for judgment for relief he deems himself entitled."

While an exhibit may be considered as a part of a pleading to clarify or explain the same, an exhibit to a pleading cannot serve the purpose of supplying necessary material averments, and the content of the exhibit is not to be taken as part of the allegations of the pleading itself.[5]

[4] Rule 15(a), Utah Rules of Civil Procedure, permits the amendment of pleadings by leave of court, and the rule is to be liberally construed so as to further the interests of justice.[6] However, the rule is to be applied with less liberality when the amendments are proposed during or after trial, rather than before trial.[7] In any event, the granting of leave to amend is a matter which lies within the broad discretion of the court, and its rulings are not to be disturbed in the absence of a showing of an abuse of discretion resulting in prejudice to the complaining party.[8]

[5] In the instant case, the motion to amend was not made until the day of trial, and it proposed to introduce new and different causes of action. Defendants objected to the granting of the motion, contending they would be prejudiced in their defense, not having been apprised of the new claims until the morning of trial. Thereupon, the court concluded as follows:

> [T]hat the matter of the other breaches was a significant change in the cause of action (which consumed most of the trial time), that it was not consented to be tried by defendant [sic], and that no reason was adduced for not timely moving to amend prior to trial. Accordingly, the court exercises its discretion under Rule 15 to deny the motion to amend.

In light of the facts and circumstances of this case, the court did not abuse its discretion in denying the motion to amend the complaint. Girard's inability to state an adequate reason for the untimeliness of the motion discloses that this is not a case where "justice requires" an amendment. On the other hand, the disadvantage defendants would face if required to meet the new causes of action reveals that the interests of justice will best be served by the court's denial of the motion to amend.[9]

[6] We also find no merit in Girard's remaining contention that the court erred in concluding that the forfeiture had been waived by the acceptance of rent.

The ruling of the trial court follows the rule long recognized by this Court that:

> Where by reason of a breach of a condition, a lease becomes forfeited, the lessor is entitled to recover possession. He waives that right by the acceptance of rent. He cannot accept rent, and at the same time claim a forfeiture of the lease.[10]

Nevertheless, Girard contends that her acceptance of rent did not constitute a waiver because the "Notice to Cure Defaults" heretofore mentioned contained a declaration that: "No waiver of this notice or the required thirty (30) days to cure the above-mentioned defaults will be granted unless in writing and signed by all parties concerned." However, her contention is to no avail.

In *Woodland Theatres, Inc. v. ABC Intermountain Theatres, Inc.*,[11] the Court con-

5. *Hoover Equipment Company v Smith*, 198 Kan. 127, 422 P.2d 914 (1967); *see also* 71 C.J.S. Pleading § 375(2); 41 Am Jur Pleading § 56.

6. *Gillman v. Hansen*, 26 Utah 2d 165, 486 P 2d 1045 (1971).

7. *Id.*

8. *Johnson v. Brinkerhoff*, 89 Utah 530, 57 P 2d 1132 (1936).

9. *Id*

10. *Brigham Young Trust Company v Wagener*, 13 Utah 236, 44 P 1030 (1896), cited with approval in *Woodland Theatres, Inc v. ABC Intermountain Theatres, Inc*, Utah, 560 P 2d 700 (1977).

11. *Supra* n 10, at page 701.

cluded that such a unilateral reservation avails the lessor nothing.[12]

The trial court's award of attorney fees is vacated and set aside. In all other respects, the judgment is affirmed. Each party to bear their own costs.

STEWART, OAKS, HOWE and DURHAM, JJ., concur.

T. Ray PHILLIPS, Plaintiff and Respondent,

v.

UTAH LOCAL GOVERNMENTS TRUST, Defendant and Appellant.

No. 18279.

Supreme Court of Utah.

March 11, 1983.

Retired city employee, who elected to continue coverage under policy providing hospital and medical benefits for city employees, sought to recover benefits for injuries he sustained in a fall while engaged in casual hourly work. The Second District Court, Weber County, Ronald O. Hyde, J., granted summary judgment in favor of the employee, and the insurer appealed. The Supreme Court, Oaks, J., held that employee was entitled to coverage under the policy, despite clause in the policy excluding coverage when workmen's compensation is or should be available.

Affirmed.

Howe, J., concurred in the result.

Insurance ⇨467.11

Retired city employee, who elected to continue coverage under policy providing hospital and medical benefits for city employees, was entitled to coverage for injuries he sustained in a fall while engaged in casual hourly work, despite clause in the policy excluding coverage when workmen's compensation is or should be available.

Michael T. McCoy, Salt Lake City, for defendant and appellant.

Stephen A. Laker, Ogden, for plaintiff and respondent.

OAKS, Justice:

Defendant is the underwriter for hospital and medical benefits for employees of Utah cities and towns. After his retirement from Ogden City, plaintiff elected to continue his coverage, as permitted by the city and its underwriter. Thereafter, while engaged in casual hourly employment fixing a roof for a private individual, he was injured in a fall. Defendant rejected his claim for hospital and medical expenses because of the following provision in the Master Policy, which both parties apparently concede to be applicable to employees and retired employees alike:

> 7.1. The benefits described in this certificate do not cover:
>
> 7.1.1. Accidental injury arising out of or in the course of any occupation or employment for remuneration or profit or sickness for which the insured employee or insured dependent is entitled to benefits under any workmen's compensation law, employer's liability law, or similar law or for an injury suffered as the result of an accident arising out of or in the course of employment (i.e., this policy is not a substitute for workmen's compensation).

On cross-motions for summary judgment in this action against the underwriter, the district court gave plaintiff judgment for his $6,738.62, plus interests and costs, and defendant appealed.

12. *Id.*, citing with approval 3A Thompson on Real Property (1959 Replacement), Sec. 1328, p 576, 1976 Supplement, p. 74, which is now to be found in the 1981 Replacement, Sec. 1328, p 585 86

23 Utah 2d 172

KAISER ALUMINUM & CHEMICAL SALES, INC., Plaintiff and Respondent,

v.

Jack E. LORDS, Beth C. Lords and Western States Wholesale Supply, Defendants and Appellants.

No. 11470.

Supreme Court of Utah.
Oct. 22, 1969.

Action on written guarantee for prompt payment and performance of obligations of corporation in which defendants held positions of president and vice president. The Third District Court, Salt Lake County, Merrill C. Faux, J., rendered judgment for plaintiff, and defendants appealed. The Supreme Court, Callister, J., held that ruling that defendants could not inject a wholly inconsistent issue they had failed to assert and to have included in pretrial order did not amount to abuse of discretion where issue and evidence defendants sought to introduce did not qualify as a changed or newly discovered condition and defendants failed to show that the exclusion in any manner created a manifest injustice.

Affirmed.

Trial ⇐9(1)

Ruling that defendants could not inject a wholly inconsistent issue they had failed to assert and to have included in pretrial order did not amount to abuse of discretion where issue and evidence defendants sought to introduce did not qualify as a changed or newly discovered condition and defendants failed to show that the exclusion in any manner created a manifest injustice. Rules of Civil Procedure, rule 16.

Horace J. Knowlton, Salt Lake City, for appellants.

Claron C. Spencer and A. Robert Thurman, of Senior & Senior, Salt Lake City, for respondent.

CALLISTER, Justice.

Plaintiff initiated this action against the defendants on their written guarantee for the prompt payment and performance of obligations of Western States Wholesale Supply, a corporation, in which defendants held the positions of president and vice president.

Defendants asserted in their answer that on or about October 1, 1966, plaintiff, through its authorized agent, entered into an accord and satisfaction with the defendants, whereby the plaintiff received a return of its merchandise, which was in possession of defendants and Western, in consideration of the full satisfaction of the indebtedness or obligation of the defendants to plaintiff.

The complaint was filed in January of 1967 and the answer during March of 1967. A pretrial conference was held in March of 1968, with an order dated April 1, 1968. At the pretrial conference plaintiff contended that after giving credit for all payments and merchandise returned, there remained an unpaid balance of $8265.97. Defendants continued to assert that there had been a full settlement of the account and a release from their guarantee by a return of the merchandise. The pretrial order permitted the plaintiff to file an amended complaint against the corporation, Western States Wholesale Supply; plaintiff subsequently obtained a default judgment against the defendant corporation. The pretrial order listed four issues to be tried in the case; with the subsequent default of the corporation, there remained one issue: "* * * was there an agreement by the plaintiff, upon the return of certain merchandise to release the defendants from any liability on their guarantee for any balance owing to the plaintiff by Western States Wholesale Supply."

The pretrial order further states:

> The foregoing order when entered will control the subsequent course of the action, unless modified at the trial to prevent manifest injustice.

Any desired amendments must be moved for in writing within five days of the date of this order.

The jury trial was held July 9, 1968, at which time defense counsel asserted that there was another issue. Defendants did not make a motion to amend the pretrial order but merely submitted an offer of proof. Defendants offered to prove that on November 1, 1965, plaintiff's agent requested that defendant corporation, acting through its president, Jack E. Lords, execute certain promissory notes covering the indebtedness on an open account. Lords inquired what effect the execution of the notes would have upon defendants' personal guarantee of the account. Plaintiff's agent responded that the effect would be to terminate the guarantee upon any indebtedness incurred prior to the execution of the notes, but the guarantee would continue to cover any subsequent indebtedness.

Plaintiff's counsel objected to the interjection of this new issue and claimed surprise; he stated that plaintiff was not prepared to meet the issue.

The court ruled that there was nothing in the pretrial order about this new issue; and, therefore, the trial would be limited to a determination of whether an accord and satisfaction was effected by the return of certain merchandise in October or November of 1966. The trial court rendered judgment on the jury verdict for plaintiff. Defendants appeal and seek a retrial including the excluded issue.

The pretrial order controls the issues of the case where it is made without objection and no motion is made to change it, unless it is modified at the trial to prevent a manifest injustice. * * *[1]

The record in the instant action does not reveal that defendants made a motion to amend the pretrial order but merely proffered evidence on a matter not in issue. This court recently approved the exclusion by a trial court of evidence concerning an issue defendant attempted to raise during the trial, which had been neither framed in the pleadings nor raised in the pretrial order.[2]

* * * Where objection is made to the evidence on the ground it is outside the pretrial order, the court should be somewhat less liberal in amending the order than they would be if mere pleadings were involved, since the pretrial conference is held shortly before trial and at a time when each side should usually know what it intends to prove. * * *[3]

In Case v. Abrams,[4] the court observed that when the issues have been defined in the pretrial order, they ought to be adhered to in the absence of some good and sufficient reason which must rest largely within the discretion of the trial court. The court quoted the following as an appropriate guideline:

* * * "Treatment of the pretrial order after entry requires an appropriate balance between firmness to preserve the essential integrity of the order, and adaptability to meet changed or newly discovered conditions or to respond to the special demands of justice. * * *"[5]

In the instant action, the issue and evidence defendants sought to introduce did

1. Citizens Casualty Company of New York v. Hackett, 17 Utah 2d 304, 306, 410 P.2d 767, 768 (1966); also see Rule 16, U.R.C.P.; Page v. Utah Home Fire Insurance Co., 15 Utah 2d 257, 260, 391 P.2d 290 (1964); 3 Moore's Federal Practice (2d Ed.), Sec. 16, 19, pp. 1130, 1131.

2. Youngren v. John W. Lloyd Construction Co., 22 Utah 2d 207, 210, 450 P.2d 985 (1969).

3. 1A Barron and Holtzoff, Federal Practice & Procedure, Sec. 473, p. 851.

4. 352 F.2d 193 (C.A. 10th, 1965).

5. See Honorable A. Sherman Christenson on "The Pre-Trial Order," 29 F.R.D. 362, 371.

not qualify as a changed or newly discovered condition, since they had knowledge of these facts from November of 1965. Furthermore, defendants have not indicated that the exclusion, in any manner, created a manifest injustice. It was not an abuse of discretion for the trial court to rule that defendants could not inject a wholly inconsistent issue they had failed to assert and have included in the pretrial order.

The judgment of the trial court is affirmed; costs are awarded to plaintiff-respondent.

CROCKETT, C. J., TUCKETT and ELLETT, JJ., and JOSEPH E. NELSON, District Judge, concur.

HENRIOD, J., does not participate herein.

23 Utah 2d 155

Darrell H. REYNOLDS, Plaintiff and Appellant,

v.

Charles S. MERRILL, Defendant and Respondent.

No. 11482.

Supreme Court of Utah.

Oct. 22, 1969.

Suit for personal injuries and property damage arising out of automobile collision. Defendant set up as defense release signed by plaintiff. The Third District Court, Salt Lake County, Stewart M. Hanson, J., entered summary judgment dismissing complaint, and plaintiff appealed. The Supreme Court, Ellett, J., held that plaintiff was entitled to have release set aside if there was mutual mistake of fact regarding injury which actually was in existence but which was unknown to both parties when release was signed, and that plaintiff was entitled to day in court to establish such material mistake.

Reversed and remanded.

Callister and Henriod, JJ., dissented.

Release ⇐16

Plaintiff was entitled to have release set aside if mutual mistake of fact existed regarding injury which actually was in existence but which was unknown to both plaintiff and insurance adjuster at time release was signed.

Wilford A. Beesley, Orval C. Harrison, Salt Lake City, for appellant.

L. E. Midgley, Salt Lake City, for respondent.

ELLETT, Justice:

This is an action to recover for personal injuries and property damages arising out of a collision between cars driven by the parties hereto. The accident occurred on Friday, June 3, 1966, when the defendant's automobile ran into the rear of the plaintiff's Volkswagen. Immediately after getting home, the plaintiff called his physician, who prescribed conservative treatment, and made an appointment for the following Tuesday. For some two and a half months thereafter the doctor treated the plaintiff for what was diagnosed as a recurrence of bursitis. On August 22, 1966, at the request of the defendant's insurance adjuster the doctor signed an Attending Physician's Report containing the following information:

(1A) Diagnosis and concurrent conditions—

[Answer] (1) Traumatic bursitis of rt. shoulder.

(2) Traumatic myositis posterior neck muscles.

(1B) Were X-rays taken? [Answer] Yes.

If yes, where? [Answer] Cottonwood Hospital.

pellants have not been foreclosed by their stipulation, we are of the opinion that probably no federal income tax would have been assessable to the corporation on a sale and distribution by the stockholders.[3]

Respondent contends that the defendant directors should not be allowed to appeal this judgment as it is in effect a consent judgment. Believing as we do that there is some merit to this contention, we nevertheless refrain from passng upon the point in view of the disposition made by us of the case.

Affirmed, with costs to respondents.

McDONOUGH, C. J., and CROCKETT, HENRIOD and WADE, JJ., concur.

4 Utah 2d 7

NATIONAL FARMERS UNION PROPERTY AND CASUALTY CO., a corporation, Plaintiff and Appellant,

v.

Leland J. THOMPSON, Defendant and Respondent.

No. 8286.

Supreme Court of Utah.

July 12, 1955.

Action by insurer to recover amount paid insured on fire policy. Insured counterclaimed for additional amount allegedly due under policy. The First Judicial District Court, Box Elder County, Lewis Jones, J., entered judgment for insured on complaint and counterclaim, and then, on his own initiative and without notice to parties, entered conditional order for new trial unless insured consented to reduction in amount of judgment. Insured moved to set aside conditional order and upon hearing of such motion, court vacated order for new trial and reinstated judgment. Insurer appealed. The Supreme Court, Crockett, J., held that since a timely motion had been interposed to set aside order granting new trial, court retained jurisdiction to vacate order granting new trial and to reinstate original judgment.

Judgment affirmed.

1. New Trial ⇐165

Where court granted a new trial unless insured within 10 days filed consent to reduce amount of judgment received in action on fire policy, and insured, within 10 days moved to set aside such order, court retained jurisdiction to set aside order for new trial and to reinstate original judgment. Rules of Civil Procedure, rules 6 (b), 59(d).

2. New Trial ⇐163(2)

An order denying a new trial is final in character and operates to terminate trial court's jurisdiction for the reason that once trial judge has made his decision no further modifications can be made, and losing party, if he feels impelled to seek further redress, must appeal.[1]

3. New Trial ⇐163(2)

An order granting a new trial is different in character than an order denying one, and the latter terminates the cause, while the former operates to vacate the judgment and reinstate the case as one undisposed of before the court, and over which the court retains jurisdiction.

4. New Trial ⇐165

Where trial court made order for new trial on his own initiative and without notice to the parties, court had power to set aside the order. Rules of Civil Procedure, rules 7(b), 52(b).

5. Insurance ⇐115(1)

A person having such interest in property that he may derive pecuniary benefit from property's continued existence or suffer pecuniary loss from its destruction by fire has such "substantial economic in-

3. United States v. Cumberland Public Service Co., 338 U.S. 451, 70 S.Ct. 280, 94 L.Ed. 251.

1. Lake v. Coleman, 38 Utah 383, 113 P. 1023.

terest" within statute as to give him an insurable interest which will permit him to enforce insurance contract. U.C.A.1953, 31-19-4.

See publication Words and Phrases, for other judicial constructions and definitions of "Substantial Economic Interest".

6. Insurance ⇨115(6)

In action to recover amount paid under fire policy, evidence was sufficient to support trial court's finding that insured, who had sold building insured but had retained right to use building to store machinery, had an insurable interest in building. U.C.A.1953, 31-19-4.

7. Courts ⇨85(2)

Under Rules of Civil Procedure, if an issue is to be tried and a party's rights concluded with respect thereto, the party must have notice thereof and an opportunity to meet it. Rules of Civil Procedure, rule 15(b).[2]

8. Judgment ⇨305

In action to recover amount paid on fire policy, where insured counterclaimed to recover additional amount under policy, where parties stipulated to value of insured structure, but insured testified that he was to receive $1,000 additional in sale of certain property if such building was included in sale, and jury found that value of building was $2,000, court properly corrected its order that building was only worth $1,000 by restoring jury's finding of value. Rules of Civil Procedure, rules 15(b), 54(c).

Stewart, Cannon & Hanson, Salt Lake City, for appellant.

Paul Thatcher, Ogden, for respondent.

CROCKETT, Justice.

Plaintiff Farmers Insurance Company sued to recover $2,000 it had paid Leland J. Thompson for loss by fire of a frame building used to store farm machinery; Mr. Thompson counterclaimed for $4,000 additional for machinery also damaged by the fire. The issues of fact were submitted to a jury on special interrogatories, all of which were answered favorably to the defendant Thompson and judgment was entered thereon.

The first matter of concern is one of procedure. The trial judge, on his own initiative and without notice to the parties, entered a conditional order: that a new trial be granted unless the defendant, within ten days, filed his consent to reduce the amount of $2,000 allowed for the frame building to $1,000, which the judge recited was the actual value of the building as found by him.

Thompson failed to file a consent to so reduce the judgment within the ten days, but just before 5 p. m. on the 10th day filed a motion to amend the court's finding of $1,000 as to the value of the building to $2,000, as found by the jury, and to set aside the conditional order; at the same time of this filing the clerk filed an order granting the new trial in accordance with instructions previously given him by Judge Jones to file it if the consent to reduce the judgment did not come in. This motion was called up for hearing, and after arguments and filing of briefs, some five months later, the court entered its order "vacating order for a new trial and reinstating judgment" restoring the original jury finding of $2,000 as the value of the building.

[1] The plaintiff Farmers Insurance challenges this action as improper, insisting that after the trial court made its order conditionally granting a new trial it was functus officio with respect to the cause and had no further authority to vacate such order. It reasons that since the court would not have had jurisdiction, on its own initiative in the absence of a motion, to enter an order granting a new trial after ten days from the entry of judgment,[1] it likewise could not modify or set aside an order for a new trial made within the ten day period even though a motion to vacate

2. Taylor v. E. M. Royle Corp., 1 Utah 2d 175, 264 P.2d 279; Morris v. Russell, Utah, 236 P.2d 451.

1. Rule 59(d) U.R.C.P., Rule 6(b) U.R.C.P. See Barron and Holtzoff, Federal Practice and Procedure, Vol. 3, page 241.

was also filed within ten days. Defendant's position is not well taken. It must be kept clearly in mind that there is a significant difference between a trial court's attempt to enter an order affecting a judgment after the lapse of ten days where no motion has been filed, and his action thereon where a timely motion has been interposed, as was the case here.

[2, 3] Plaintiff refers to Luke v. Coleman [2] wherein this court held that an order *denying* a new trial is final in character and operates to terminate the trial court's jurisdiction for the reason that once the trial judge had made his decision no further modifications can be made. This is based upon the principle, which we recognize as sound, that there must be some point where litigation terminates and if the losing party is so aggrieved that he feels impelled to seek further redress it must be to the appellate court. Indeed, if a judge were allowed to change his decision and in effect reverse himself, tenacious litigants and lawyers might persist in arguments and pressures which would be both interminable and intolerable. We recognize some merit, however, in defendant's argument that an order *granting* a new trial is different in character than an order *denying* one. The latter terminates the cause, while the former operates to vacate the judgment and reinstate the case as one undisposed of before the court, over which it retains jurisdiction.[3]

[4] Focusing attention directly on the trial court's action in first changing, then restoring, the jury's finding as to the value of the building: most of us have need to reflect, all too often, that "hindsight" is not only more accurate than foresight, but we have a lot more of it. It now seems clear enough that it would have been wiser for the trial judge to have notified the parties of his intention, given them an opportunity to present their arguments and then made his decision as to whether the judgment should be as found by the jury, or modified as he apparently first thought it should be.

Fortunately for the benefit of "hindsight," our Rules of Civil Procedure allow some latitude for correction of such sua sponte actions by the court by making specific provision for their reconsideration by him. Rule 7(b), insofar as applicable here, provides:

> "* * * any order made without notice to the adverse party may be vacated or modified without notice by the judge who made it, or may be vacated or modified on notice."

Since the defendant filed a motion to set aside the conditional order within ten days, and thus before it was to take effect, it never became operative. The effect of this was to hold it in abeyance until the court had an opportunity to pass upon the motion. And Rule 7(b) just referred to confers express authority upon the judge to set aside the order he had made.

The other aspect of the defendant's motion which the trial court granted, that of amending the judgment back to conform to the original finding of the jury, finds support in Rule 52(b), U.R.C.P., which reads in part: "Upon motion of a party made not later than 10 days after the entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly." Such motion was also timely filed under this rule and arrested the running of time until the trial court acted upon it.

We are not here concerned with what the situation would be if the motion had been filed after the ten days had elapsed, nor whether the court could vacate an order granting a new trial if the original motion for a new trial had been properly noticed and heard.

Turning from the procedural aspects of the case to the merits: the Farmers Insurance Co. insists that the evidence does not support the finding of the jury that

2. 38 Utah 383, 113 P. 1023.

3. DeLuca v. Boston Elevated Railway Company, 312 Mass. 495, 45 N.E.2d 463, and Farmers & Merchants National Bank of El Dorado v. Wright, 98 Kan. 248, 157 P. 1178. See Bateman v. Donovan, 131 F.2d 759, where the Ninth Circuit Court of Appeals approved the modification of an order *granting* a new trial some 45 days after it was granted.

Mr Thompson had an insurable interest in the building because it had been sold by him before the fire

[5] The parties and this court are all in accord as to the soundness of the rule that one who has no interest in property cannot insure it This is generally accepted and is enacted into statute in this state Section 31–19–4, U C A 1953, provides

> "(1) No contract of insurance * * * shall be enforceable except for the benefit of persons having an insurable interest in the things insured
>
> "(2) 'Insurable interest' as used in this section means any lawful and substantial economic interest in the safety or preservation of the subject of the insurance free from loss, destruction, or pecuniary damage"

The pertinent inquiry here is what the term "substantial economic interest" as used in the foregoing statute means We agree that such an interest would not exist if it were based solely upon an agreement that an owner (such as Hardy) would permit another (such as Thompson) to insure the owner's (Hardy's) property for the benefit of the latter (Thompson) unless the latter had some interest in the property other than the right to recover if it were destroyed by fire Such an agreement would permit one having no interest in the property except a potential gain from its destruction to gamble upon its loss and would be against public policy[4] It is unquestionably true that the party insuring must have some interest beyond this But if he has an interest of any character in the property so that he will or may derive some pecuniary benefit from the continued existence of the property or suffer pecuniary loss from its destruction by fire,[5] he may properly be said to meet the statutory requirement of having a "substantial economic interest" If this test is met, that suffices, and the nature of his interest or the status of title or possession is immaterial[6]

[6] The facts which bear upon the question whether Thompson had an insurable interest in the building are these He had been carrying insurance on it with plaintiff before he sold his farm, and this building to Mr John M Hardy In connection with this sale Hardy agreed that Thompson should retain possession and use of the building to store his machinery The jury expressly found that Thompson had 'sold but not conveyed' the building to Hardy There was testimony that the defendant advised the insurance company of this fact by letter and that the company accepted a renewal premium contained in that letter and mailed the receipt back to Thompson In answer to another question the jury found that this sale was "not unknown to the plaintiff Farmers Insurance It is undisputed that Thompson did retain possession of the building, that his machinery was stored therein and that he had never turned the keys over to Mr Hardy

Defendant's evidence was in substance that Mr Thompson had obligated himself to be "responsible" to Mr Hardy for the building during the time he retained possession and used it, that he expected to make it good and Hardy expected to be paid for it Having assumed such obligations Thompson had a right as well as a duty to protect the building and stood to benefit by its continued existence or to lose if it burned, upon the basis of these facts the finding that Thompson had an insurable interest in the building can be sustained under the test above set out.

[7, 8] Another controversy here is the Farmers Insurance Company's argument that it is indisputable that the building was only worth $1,000, that therefore the trial judge was correct in ordering that the $2 000 value be reduced to $1,000 and that he committed error in vacating such order In explanation of his later action the judge stated, "the court did not have in mind the fact that the parties, by their pleadings had stipulated to the value of said structure '

4. See Price v United Pacific Casualty Ins. Co, 153 Or 259, 56 P 2d 116

5. 44 C J S, Insurance, § 180 and cases cited in footnote 57 at page 877 See 4 Appleman Insurance Law and Practice Section 2123.

6 44 C J S, Insurance, § 180

The plaintiff's complaint alleged the value of the building to be $2,000 which the defendant admitted by answer and the plaintiff again so alleged in its reply to the defendant's counterclaim. The issue of its value was never raised at the trial. However, in connection with the dispute over insurable interest, defendant testified that he had a financial interest in the building in that he was to receive $1,000 additional if the building was included in the deal. That was the only evidence bearing upon the question of value.

Plaintiff urges that inasmuch as the evidence of value just referred to was voluntarily introduced by defendant, the court could pass on the issue, citing Rule 15(b) to the effect that, though an issue is not raised by the pleadings, liberal amendments should be allowed "even after judgment"; and further that the judge could modify the judgment as he did, under the authority of Rule 54(c): "* * * every final judgment shall grant the relief to which a party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

Notwithstanding all of our efforts to eliminate technicalities and liberalize procedure, we must not lose sight of the cardinal principle that under our system of justice, if an issue is to be tried and a party's rights concluded with respect thereto, he must have notice thereof and an opportunity to meet it.[1] This is recognized in Rule 15(b) which recites that such liberal amendments shall be allowed if the issue is tried "by express or implied consent of the parties." It does not appear that there was any such consent to try the issue of the value of this building. Defendant now urges that had the matter been in dispute, he could have adduced evidence that this was a forced sale and other proof supporting his claim of value. The plaintiff had an opportunity to raise this issue, but instead of doing so, pleaded its value as $2,000, which was agreed to by the defendant. As the matter was presented, and under the findings of the jury as made, we are of the opinion that there was no impropriety in the trial court correcting his original order by restoring the value to $2,000 as pleaded by the parties and as found by the jury.

The plaintiff's final contention is that the insurance policy was void by reason of misrepresentation made by the defendant in applying therefor. It is sufficient to note that upon disputed evidence the jury found that no such misrepresentation was made.

Affirmed. Costs to defendant.

McDONOUGH, C. J., and HENRIOD, WADE and WORTHEN, JJ., concur.

1. See Taylor v. E. M. Royle Corp., 1 Utah 2d 175, 264 P.2d 279; Morris v. Russell, Utah, 236 P.2d 451, 26 A.L.R.2d 947.

15 Utah 2d 257

Meredith PAGE, Plaintiff and Appellant,

v.

UTAH HOME FIRE INSURANCE COMPANY, a Utah corporation, Defendant and Respondent.

No. 9902.

Supreme Court of Utah.

April 9, 1964.

Action on $10,000 fire policy and on $20,000 fire policy. On the basis of the jury's findings, the Third District Court, Salt Lake County, Merrill C. Faux, J., entered judgment denying plaintiff recovery on either policy and thereafter granted a new trial as to the $10,000 policy. The plaintiff appealed and the defendant cross-appealed. The Supreme Court, McDonough, J., held that trial judge did not abuse his discretion when he ordered new trial as to $10,000 fire policy so that issue of failure of insurance company's agent to disclose material facts when he applied to company for $10,000 fire policy on his own property could be tried separately from issue of failure to disclose material facts with respect to $20,000 fire policy.

Affirmed and cause remanded.

1. Appeal and Error ⇐931(1)

Conflicting evidence was reviewed in light most favorable to finding against plaintiff-appellant.

2. Trial ⇐9(1)

It was proper to allow issue in case after pretrial conference and order, where plaintiff had ample opportunity to meet the issue in that three weeks before trial the court had granted motion to amend order to include issue.

3. Trial ⇐349(1)

The trial court did not err in submitting special interrogatories instead of general verdict as requested by plaintiff. Rules of Civil Procedure, rule 49(a).

4. Appeal and Error ⇐922

Jurors are presumed to be of ordinary intelligence.

5. Trial ⇐352(15)

Interrogatory as to whether insured knowingly failed to make full and honest disclosure of material facts to fire insurer was not vague and uncertain in that jury would not understand what the material facts were.

6. Insurance ⇐258

Insurance company's agent had affirmative duty to make disclosure of material facts relating to insurability and risk involved when he applied to company for fire insurance on his own property; his failure to make disclosure of facts which would have material bearing upon decision as to whether to issue insurance constituted fraud on company sufficient to avoid the policy.

7. New Trial ⇐9

Trial judge did not abuse his discretion when he ordered new trial as to $10,000 fire policy so that issue of failure of insurance company's agent to disclose material facts when he applied to company for $10,000 fire policy on his own property could be tried separately from issue of failure to disclose material facts with respect to $20,000 fire policy. Rules of Civil Procedure, rule 42(b).

8. New Trial ⇐6

Trial court has broad discretionary power to grant or deny new trial.

9. Appeal and Error ⇐977(1)

The Supreme Court is reluctant to interfere with trial court's exercise of his discretionary power to grant or deny new trial unless trial court clearly acted unreasonably and arbitrarily.

Dahl & Sagers, Midvale, for appellant.

Lawrence L. Summerhays, Salt Lake City, for respondent.

McDONOUGH, Justice:

Plaintiff sued to recover under two fire insurance policies issued by the defendant, one for $20,000 and one for $10,000 on a fourplex building owned by plaintiff, which was destroyed by fire.

The case was submitted to the jury on these special interrogatories:

"1. What was the actual cash value of the burned fourplex just before it was destroyed by fire?

"Answer: $10,000.

"2. Did plaintiff Meredith Page knowingly fail to make a full and honest disclosure to defendant Fire Insurance Company of the material facts regarding the nature and intended use of the burned fourplex?

"Answer: Yes."

On the basis of the jury's findings, the court entered judgment denying plaintiff recovery on either policy. But it later entered an order granting plaintiff's motion for a new trial. Upon a reconsideration of that order, the court stated that he thought that the issues as to the two policies should have been submitted to the jury separately. He then reinstated the judgment against the plaintiff as to the first policy (the $20,000 one). But as to the second policy (the $10,000 one) he ordered a new trial on the single issue posed by interrogatory No. 2 above set forth.

The plaintiff appealed from the judgment against him on the first policy (the $20,000 one); whereas the defendant seeks to sustain it; and the defendant cross-appealed, asking reinstatement of the judgment against the plaintiff on the second policy (the $10,000 one).

[1] Inasmuch as the jury found against the plaintiff, that he did not make a full disclosure of material facts to the defendant, wherever there is conflict in the evidence on that issue, the defendant is entitled to have us review it in the light most favorable to that finding.

Plaintiff Page purchased the building in question from the U. S. Government in December, 1958, for approximately $1,800. It was a substantial building which had been used as an Air Force Officers' Quarters at the Salt Lake Air Base. It was the plaintiff's purpose to, and he in fact did, move the building about 20 miles to the southern part of Salt Lake County and placed it on property at 14610 South State Street, just south of Utah State Prison.

Plaintiff Page had been an agent for the defendant Utah Home Fire Insurance Company for over 30 years, and worked through Heber J. Grant & Company, a general agent for the defendant. Shortly after he purchased the building, Mr. Page discussed with Mr. O. C. Inkley, Secretary of that Company, the matter of taking out fire insurance on it. He gave the information as to its size, construction and condition; that the plumbing, heating and lighting were in; that he intended to move the building; and that it would need some minor repairs. But the defendant's evidence is that Mr. Page did not disclose to Mr. Inkley these facts: that the building would have to be cut in several pieces to be moved; that the internal wiring, plumbing and heating lines would be cut; that many of the windows and some of the walls were damaged; and that the building would remain vacant for some time.

There can be no doubt but that these facts would increase the fire risk. The Company relied on Mr. Page's representations as to the condition and location of the building and did not send anyone else out to inspect it. On December 31, 1958, it issued a fire insurance policy for $20,000 showing the location of the building to be at 14610 South State Street. The policy was signed by the plaintiff, Meredith Page, as agent. The building was severed and in four or five pieces was moved to that location in April, 1959. Some time after it was set up there and some superficial repairing done on it, Mr. Page, by telephone, ordered an additional policy on it in the amount of $10,000. Pursuant to this order, the second policy (the $10,000 one) was issued on June 27, 1960, also signed by the plaintiff Meredith Page as agent. It was about eight months later, on February 11, 1961, that the building was destroyed by fire.

[2, 3] We are not impressed with the plaintiff's contention that the issue of fraud

and failure to disclose was improperly allowed in the case because it was done after the pretrial conference and order. Three weeks before trial the court granted defendant's motion to amend the order to include the issue whether plaintiff violated his fiduciary duty. Plaintiff had ample opportunity to meet the issue, and that is all that is required.[1] Nor do we find merit in the charge that the court erred in submitting the special interrogatories instead of a general verdict, as requested by the plaintiff. This procedure is sanctioned by our rules.[2]

[4, 5] The plaintiff also contends that the second interrogatory concerning whether Mr. Page knowingly failed "to make a full and honest disclosure of material facts" is vague and uncertain in that the jury would not have understood what the material facts were. Upon our survey of the trial and of the respective contentions of the parties, it is our opinion that jurors of ordinary intelligence, which they are presumed to be, would have had no difficulty in understanding what was meant by the material facts and that the issue they were to determine was whether the plaintiff disclosed such facts to the Company. Accordingly, we find no prejudicial error in that regard. The same observations and conclusion apply to the instructions as to value about which the plaintiff complains.

[6] Due to the fact that the plaintiff as agent for the defendant Company was in an advantaged position to know the facts concerning the insurability and the risk involved on this property, and to the fiduciary relationship he bore to the defendant Company as its agent, he had an affirmative duty to make disclosure of the material facts relating to the insurability and the risk involved in this property. This is particularly so because of his self-interest in the transaction. Under such circumstances, the failure to make disclosure of facts which would have a material bearing upon the decision as to whether to issue the insurance constitutes a fraud on the principal sufficient to avoid the policy, and the trial court was justified in entering such judgment on the basis of the jury's findings that he failed to make such disclosure.[3]

[7-9] A substantially different problem exists in regard to the second policy (the $10,000 one) in view of the fact that the trial court granted a new trial with respect thereto. Although the observations above made about the judgment on the $20,000 policy are generally applicable to the $10,000 policy, there are some substantial differences. When the latter policy was issued the building had been moved and restored in its new location. The transaction in obtaining the policy was handled in a different manner and with different personnel. Additionally, there had been a fire loss to an outbuilding (a toolshed) on the premises, which the defendant Company had sent another of its agents to inspect. These facts may justify the trial court's conclusion that the issue as to disclosure of material facts as to the $10,000 policy should be tried separately. Rule 42(b) U.R.C.P. recognizes that when the court considers it convenient or desirable in the interest of justice, any separate issue may be tried separately.[4]

The broad discretionary power of the trial court in the granting or denying of new trials is well established. This is necessarily so to allow the court an opportunity to cause re-examination or correction of jury verdicts or findings which it believes to be in error or where there is

1. See Morris v. Russel, 120 Utah 545, 236 P.2d 451, 26 A.L.R.2d 947; and Taylor v. E. M. Royle Corp., 1 Utah 2d 175, 264 P.2d 279.

2. Rule 49(a) U.R.C.P.

3. Restatement of Agency, Sec. 390; see also Fireman's Fund Ins. Co. v. McGreevy, 8 Cir., 118 F. 415; Westchester Fire Ins. Co. of New York City v. Fitzpatrick, 3 Cir., 2 F.2d 651; Cascade Fire & Marine Ins. Co. v. Journal Pub. Co., 1 Wash. 452, 25 P. 331; Muncey v. Security Ins. Co., 43 Idaho 441, 252 P. 870.

4. See comment on the rule in Raggenbuck v. Suhrmann, 7 Utah 2d 327, 325 P.2d 258.

substantial doubt that they were fairly tried. And we have repeatedly expressed our reluctance to interfere with its judgment in such matters unless the action is clearly unreasonable and arbitrary. There having been a plenary trial of the controlling issue as to the $20,000 policy; the jury having rendered its verdict adverse to the plaintiff; and the trial court having given its approval by refusing to grant a new trial thereon, that is all the parties are entitled to and the judgment with respect thereto is affirmed. On the other hand, the trial court having concluded that as to the $10,000 policy there should be a new trial on the issue whether the plaintiff made a full and honest disclosure of the material facts, we are not prepared to say that he transgressed the broad latitude of discretion allowed him in such matters, and that order is likewise affirmed, and the cause is remanded for trial of that issue. The parties to bear their own costs.

HENRIOD, C. J., and CALLISTER, CROCKETT and WADE, JJ., concur.

15 Utah 2d 262

UNIVERSAL C. I. T. CREDIT CORPORATION, Plaintiff and Respondent,

v.

Rex L. SOHM and Katheryn Sohm, Defendants and Respondents, and Third-Party Plaintiffs,

v.

Richard H. NICKLES, d/b/a Zion Management, Third-Party Defendant and Appellant.

No. 9865.

Supreme Court of Utah.

April 15, 1964.

Action of deceit based on alleged wilful misrepresentation in connection with sale of new-type electronic stove. The Third District Court, Salt Lake County, Joseph G. Jeppson, J., rendered judgment for the buyers, and the appliance company appealed. The Supreme Court, Henriod, C. J., held that evidence adduced by buyers of stove which was specifically recommended to them by another couple was insufficient to establish that selling appliance dealer and/or his agent practiced fraud with respect to the alleged capabilities of the stove.

Reversed.

Crockett, J., dissented.

1. Fraud ⇨58(1)

Fraud must be proved by clear and convincing evidence, or, stated another way, by clear preponderance of evidence.

2. Fraud ⇨50

For buyers to recover in action for alleged deceit based on alleged wilful misrepresentation in connection with sale of electronic stove, they were required to demonstrate that the appliance dealer and/or his agent intentionally, wilfully, clearly and convincingly practiced a fraud on plaintiffs by way of telling them deliberate lies.

3. Fraud ⇨58(1)

Evidence adduced by buyers of electronic stove which was specifically recommended to them by another couple was insufficient to establish that selling appliance dealer and/or his agent practiced fraud with respect to the alleged capabilities of the stove.

Barker & Ryberg, Salt Lake City, for appellant.

Keith E. Sohm, Salt Lake City, for respondents.

HENRIOD, Chief Justice:

Appeal from a judgment for damages in an action of deceit based on alleged wilful misrepresentations in connection with the sale of a new-type electronic stove. Reversed with costs to defendants.

7 Utah 2d 327

Edith RAGGENBUCK et al., Plaintiffs and Respondents (11 cases),

v.

Emil SUHRMANN, dba Suhrmann's South Temple Meat Company, and Albert Noorda and Sam L. Guss, dba Jordan Meat and Livestock Company and Valley Sausage Company, a Utah corporation, Defendants and Appellants.

No. 8753.

Supreme Court of Utah.

May 8, 1958.

Actions were brought for trichinosis contracted by plaintiffs through eating sausage. The Third District Court, Salt Lake County, A. H. Ellett, J., entered an order consolidating to determine liability only, eleven actions involving nineteen plaintiffs, and the defendants appealed. The Supreme Court, Wade, J., held that consolidation was not prejudicial to defendants and did not violate constitutional provision that no person should be deprived of property, without due process of law, or constitutional provision dealing with right of trial by jury, or statute providing that in action for injuries, issue of fact may be tried by the jury, unless jury trial is waived or reference is ordered, or statute providing that all questions of fact, where trial is by jury, other than those mentioned in following statute, are to be decided by the jury.

Order affirmed.

1. Appeal and Error ⇐1035
Constitutional Law ⇐305
Jury ⇐31(3)
Trial ⇐2

Consolidation, to determine liability only, of eleven actions involving nineteen plaintiffs claiming damages for trichinosis contracted by eating sausage, was not prejudicial to defendants and did not violate constitutional provision that no person should be deprived of property, without due process of law, or constitutional provision dealing with right of trial by jury, or statute providing that in action for injuries, issue of fact may be tried by the jury, unless jury trial is waived or reference is ordered, or statute providing that all questions of fact, where trial is by jury, other than those mentioned in following statute, are to be decided by the jury. Rules of Civil Procedure, rule 42; Const. art. 1, §§ 7, 10; U.C.A.1953, 78-21-1, 78-21-2.

2. Trial ⇐2

Use of term "the jury" in statute providing that all questions of fact, where trial is by jury, other than those mentioned in following statute, are to be decided by "the jury" does not mean that one and the same jury must try all issues in the case, but simply means that all questions of fact are to be decided by the jury impaneled to try such issues. U.C.A.1953, 78-21-2.

Grant Macfarlane, Hurd, Bayle & Hurd, Wallace R. Lauchnor, Robert Gordon, Salt Lake City, for appellants.

Rawlings, Wallace, Roberts & Black, Thomas A. Duffin, Salt Lake City, for respondents.

WADE, Justice.

This is an intermediate appeal from an order of the District Court consolidating to determine liability only, 11 suits involving 19 plaintiffs. Each plaintiff claims damages from all of the defendants for contracting trichinosis through eating a sausage mettwurst product purchased from defendant Suhrmann, doing business as Suhrmann's South Temple Meat Company.

The plaintiffs claim that the other defendants are liable for such damages because they had a part in the preparation of the sausage mettwurst product for sale. They claim damages based on negligence and a breach of an implied warranty. Each plaintiff alleges the same facts as the basis of liability. However, the liability of defendant Suhrmann is based on his selling such product, whereas the lia-

bility of the other defendants is based on them supplying Suhrmann with this product. There may be a sharp conflict in the evidence as to such facts.

[1] The order complained of was made on motion of plaintiffs and opposed by the defendants who initiated the intermediate appeal. Appellants contend (1) that such consolidation is contrary to the Constitution and statutory provisions of this State, and (2) that it would be highly prejudicial to defendants. We conclude that the trial court's order was neither erroneous nor a breach of its discretion.

Before considering defendants' claims we call attention to Rule 42 of Utah Rules of Civil Procedure. Subdivision (a) thereof expressly authorizes the trial court to order a joint hearing of common questions of law or fact arising from different actions and to order such proceedings as may tend to avoid unnecessary costs or delay. Subdivision (b) authorizes the trial court in furtherance of convenience or to avoid prejudice to order a separate trial of any separate issue or any number of issues. So, unless the trial court's order is contrary to the Constitution or statutes of this State, or is likely to be prejudicial to defendants, it was clearly within the discretion of the trial court to order a consolidation for trial of the issue of liability in all of these cases.

(1) This order does not violate any constitutional or statutory provision. To support their contention contrary to this statement defendants rely on Article I, Section 7 of our Constitution that no "person shall be deprived of * * * property, without due process of law"; also Article I, Section 10, providing:

"In capital cases the right of trial by jury shall remain inviolate. In courts of general jurisdiction, except in capital cases, a jury shall consist of eight jurors. In courts of inferior jurisdiction a jury shall consist of four jurors. In criminal cases the verdict shall be unanimous. In civil cases three fourths of the jurors may find a verdict. A jury in civil cases shall be waived unless demanded."

From the details therein provided counsel concludes that the legislature has no power to change those provisions. We do not disagree with this conclusion but we find nothing in either Section 7 or 10 which is not in complete harmony with the trial court's order.

Counsel then refers to Section 78-21-1, U.C.A.1953, as follows:

"In actions for the recovery of specific real or personal property, with or without damages, or for money claimed as due upon contract or as damages for breach of contract, or for injuries, an issue of fact may be tried by a jury, unless a jury trial is waived or a reference is ordered."

and Section 78-21-2, U.C.A.1953, as follows:

"*All questions of fact*, where the trial is by jury, other than those mentioned in the next section, *are to be decided by the jury*, and all evidence thereon is to be addressed to them, except when otherwise provided." (Italics taken from appellants' brief.)

[2] Counsel claims that this statute, since it uses the term "the jury," means that one and the same jury must try all issues in the case. This is obviously a strained construction of that language. That language simply means that all questions of fact are to be decided by the jury impaneled to try such issues. It does not consider or determine the question of whether more than one jury may try different issues in a case. So, we conclude that neither the Constitution nor these statutes have any bearing on whether the same jury must decide all issues of fact in a given case.

(2) We are also unable to see that the consolidation of these cases for determination of liability only by one jury will be prejudicial to the defendants. Certainly a single determination of the question of liability will tend to save time and expense in the trial. Especially is this true since it

is agreed that there will be a sharp conflict in the evidence on the facts which will be determinative of liability.

Defendants' claim, that the consolidation of the cases to determine liability only will be prejudicial, is based on two propositions: (1) They claim that a jury which determines liability only without assessing specific amounts of damages is more apt to decide that question against them than would a jury charged with a determination of the amount of damages. (2) They claim that if the same jury determines liability and the amount of damages, the amount of damages would probably be greatly reduced.

We see no reason why a jury which determines only the question of liability would be more apt to determine that question against the defendants or either of them than would a jury which also determined the amount of damages. In fact, it is sometimes claimed that a showing that damages have been sustained appeals to the emotions of the jury and causes little or no consideration of the facts which create liability. In such case a jury which determines liability only would more carefully consider the facts on which such liability is claimed than would a jury charged with assessing the amount of damages also.

The claim that a jury which heard all the evidence on liability and damages would be likely to reduce the amount of damages is only well founded where a serious doubt of liability causes a compromise verdict on the amount of damages. Of course, the defendants are not entitled to the benefit of such a compromise verdict. They are only entitled to a separate fair consideration of the issues of fact which are determinative of the question of liability and the amount of damages. In either event we cannot see that either plaintiffs or defendants will be prejudiced by the order of consolidation made by the trial court.

Order of the trial court is affirmed. Costs to respondents.

McDONOUGH, C. J., and CROCKETT and WORTHEN, JJ., concur.

HENRIOD, Justice.

I concur, but make the following observation. The consolidation to determine liability which was ordered at pre-trial, so far as I can determine from the record, was without any motion therefor having been made by any of the parties. The consolidation to determine liability no doubt was made to expedite matters and save expense. I am wondering if expedition and saving of expense would not be accomplished further if consolidation were ordered to determine not only liability but to determine damages, if liability were established. In such event, one jury could handle all matters and it would save a great deal of time and expense in impanelling eleven new and different juries.

7 Utah 2d 331

MINERSVILLE LAND & LIVESTOCK COMPANY, Plaintiff and Respondent,

v.

Earl P. STATEN, Administrator of the Estate of William Story, Jr., deceased, et al., Defendants and Appellants.

No. 8662.

Supreme Court of Utah.

May 14, 1958.

Action to quiet title to land and for order directing state to issue patent to land. The Fifth Judicial District Court, Beaver County, Will L. Hoyt, J., rendered judgment for plaintiff, and defendants appealed. The Supreme Court, McDonough, C. J., held that failure of purchaser of land which had been granted by federal government to state for use of agricultural college, and his successors in interest to demand issuance of patent or state's delay in issuing patent could not defeat plaintiff's title to land by adverse possession where state had received payment of purchase price long before plaintiff's entry, state claimed no interest

TAYLOR v. E. M. ROYLE CORP.

No. 8028.

Supreme Court of Utah.

Dec. 2, 1953.

Action was brought to recover money allegedly owed plaintiff by defendant for services performed by plaintiff as manager for defendant. The Fourth Judicial District Court of Utah County, Joseph E. Nelson, J., entered judgment for plaintiff, and defendant appealed. The Supreme Court held that it was error to charge defendant with liability under quantum meruit, an issue which defendant was never called on to meet.

Judgment reversed.

1. Courts ⇐85(2)

The Utah Rules of Civil Procedure should be liberally construed to secure a just determination of every action, but they do not represent a one-way street down which but one litigant may travel. Rules of Civil Procedure, rule 1(a).

2. Courts ⇐85(2)

Under the Utah Rules of Civil Procedure, a defendant must be extended every reasonable opportunity to prepare his case and to meet an adversary's claims. Rules of Civil Procedure, rule 54(c) (1).

3. Master and Servant ⇐80(14)

Where plaintiff managed defendant's store under written contract, which by its terms ended March 1, and after March 1 plaintiff stayed on as manager and accepted the same compensation until July, when plaintiff quit, and during interim parties talked of a new contract, but none was signed, and plaintiff then brought action under complaint alleging that defendant owed plaintiff certain sum of money under the terms of a new contract consummated between March and July, and no effort was made to amend complaint to conform to any different proof, nor was any proof affirmatively offered to establish a quantum meruit theory, it was error to charge defendant with liability under quantum meruit theory, since defendant was never called on to meet such issue. Rules of Civil Procedure, rule 54(c) (1).

4. Contracts ⇐346(12)

There are circumstances where court can allow recovery under quantum meruit, even though plaintiff declared on an express contract, but only if defendant had fair opportunity to be apprised of and meet issue so presented. Rules of Civil Procedure, rule 54(c) (1).

Herbert F. Smart, Salt Lake City, for appellant.

Maurice Harding, Provo, for respondent.

HENRIOD, Justice.

Appeal from a judgment for plaintiff who claimed damages for breach of an express contract of employment. That portion of the judgment based on a contract implied in law is reversed. No costs are awarded.

Plaintiff managed defendant's radio and television store under a written agreement calling for a salary and bonus, which contract, by its terms, ended March 1, 1951. Plaintiff stayed on as manager and accepted the same compensation until July, when he quit. During the interim the parties had talked of a new contract, but none was signed.

Plaintiff's complaint, a short form permitted under the rules, together with an attached exhibit, alleged that defendant owed him some $730 under the terms of a *new* contract consummated between March and July. No effort was made to amend the complaint to conform to any different proof, nor was any proof affirmatively offered to establish a quantum meruit theory. The trial court took the case under advisement. Several days later in a memorandum decision the court adjudged that there had been no express contract, but that plaintiff was entitled to recover on quantum meruit.

Quaere: Under our new rules can one recover on a contract implied in law where he pleads and attempts to prove an express contract, seeking no amendment of his pleadings, demanding no relief under and urging no claim under a quantum meruit or other theory?

Plaintiff says Rule 54(c) (1), Utah Rules of Civil Procedure[1] resolves the question affirmatively We disagree The rule reads in part that "* * * every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings * * *"

Recently we had this rule before us in Morris v Russell, Utah, 236 P 2d 451 455, where plaintiff pleaded an (1) express contract and (2) quantum meruit During the trial the latter count was stricken on defendant's motion, but was reinstated next day on plaintiff's motion We held that a judgment based on the quantum meruit count did not violate the rule Difference between that case and this is obvious

> Here, the defendant had notice of his opponent's claims, was not surprised, misled or prejudiced in his defense, having had an opportunity to meet the issues presented

[1,2] It is true that our new rules should be "liberally construed' to secure a "just * * * determination of every action",[2] but they do not represent a one way street down which but one litigant may travel The rules allow locomotion in both directions by all interested travelers They allow plaintiffs considerable latitude in pleading and proof, to the point where some people have expressed the opinion that careless legal craftsmanship has been invited rather than discouraged Be that as it may, a defendant must be extended every reasonable opportunity to prepare his case and to meet an adversary's claims Also he must be protected against surprise and be assured equal opportunity and facility to present and prove counter contentions,—else unilateral justice and injustice would result sufficient to raise serious doubts as to constitutional due process guarantees

Mr Justice Crockett, in the cited case, recognized the true implications of the rule and the fairness which it was designed to engender when he said. "The adding of the quantum meruit count, was the equivalent of permitting an amendment to conform to the proof * * * There is no showing that the defendants were misled or prevented from presenting all their evidence or in any way prejudiced by reinstating the count

[3] Here the record indicates that the plaintiff had an express contract in mind, not one implied in law Plaintiff sought no change in theory by way of pleading or proof We believe an injustice would result if the rule were interpreted to charge the defendant with liability under quantum meruit, an issue he was never called upon to meet

CROCKETT, Justice (concurring).

I concur in the opinion of Mr Justice HENRIOD Under the facts of this case it was improper to award judgment to plaintiff upon a theory of quantum meruit The plaintiff had been working for the defendant at a specified salary, the new contract by which his salary would have been increased as discussed by the parties contemplated services on a yearly basis. The business is seasonal A good portion of the year is quiet and the time is spent in preparation for the fall and winter when the greatest volume of merchandise is sold Inasmuch as the plaintiff worked from March 1st until July, accepting the old salary, and then quit in the off season, the only fair assumption would be that he held over under the old salary Any modification of it would have to be by express contract This is the view the plaintiff had of the matter, he so declared in his complaint and the case was tried on that theory Under those circumstances it seems manifestly unjust to impose liability upon the defendant for a higher salary on a theory of implied contract This would simply permit the court, rather than the parties to fix the compensation of the plaintiff.

[4] However under rule 54 requiring the court to "grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded

1. Lifted from Federal Rule 54(c) (1), 28 U S C A. Division of construction is reflected in Fed Rules Digest, Vol 2, pp 257-260, Federal Rules Service, Vol. 8, pp 822-834

2 Rule 1(a), U R C P

such relief in his pleadings * * *" there undoubtedly would be circumstances where the court could allow recovery under quantum meruit even though the plaintiff had declared on an express contract. It is of course true that such should never be done unless the opposing party had a fair opportunity to be apprised of and meet the issue so presented.

McDONOUGH and WADE, JJ., concur in the opinion of Mr. Justice HENRIOD and also in the comments of Mr. Justice CROCKETT.

WOLFE, C. J., not participating.

STATE et al. v. COOPERATIVE SECURITY CORP. OF CHURCH OF JESUS CHRIST OF LATTER DAY SAINTS et al.

No. 8016.

Supreme Court of Utah.

Dec. 2, 1953.

Condemnation proceedings. The Fourth Judicial District Court, Wasatch County, Joseph E. Nelson, J., rendered judgment awarding damages and the landowners appealed. The Supreme Court held that where it was earnestly urged that trial court, on remand from the Supreme Court, failed to properly reassess damages in condemnation case and it was necessary to remand case for modification of judgment so as to correct an obvious error therein, the case would also be remanded for affirmance of present judgment or for modification in consonance with further observations of Supreme Court.

Remanded.

1. Appeal and Error ⇨1096(1)

On appeal from judgment of district court to which Supreme Court on a former appeal had remanded case with instructions, Supreme Court would presume that district court followed instructions, and burden of showing that district court did not was on the one asserting such error.

2. Eminent Domain ⇨136

Where there is other comparable land available to condemnee that would have accomplished the same use to which land taken had been put, severance damages are not available to one refusing to accept such land, and in assessing damages in such a case the value of the land so refused would be the value of the land taken.[1]

3. Eminent Domain ⇨263

Where it was earnestly urged that trial court, on remand from the Supreme Court, failed to properly reassess damages in condemnation case, and it was necessary to remand case for modification of judgment so as to correct an obvious error therein, the case would also be remanded for affirmance of present judgment or for modification in consonance with further observations of Supreme Court.[2]

Arthur Woolley, Ogden, for appellants.

E. R. Callister, Jr., Atty. Gen., Walter L. Budge, Asst. Atty. Gen., for respondents.

PER CURIAM.

This case, arising out of condemnation proceedings was here before.[1] We held that the facts did not warrant severance damages, except for 2 small parcels, because there was other contiguous available comparable land which equally could have been put to the same use as that taken. The trial court, who had awarded severance damages generally, was reversed and instructed to re-assess the damages based on replacement value of the land taken, except as to the 2 small parcels, which we

Provo Water Users' Association v. Carlson, 103 Utah 93, 133 P.2d 777.

State, by and through Road Commission, v. Cooperative Security Corp. of Church of Jesus Christ of Latter Day Saints, 247 P.2d 269.

1. Utah, 247 P.2d 269.

Melody WILLIAMS, Plaintiff, Appellant and Cross-Respondent,

v.

STATE FARM INSURANCE COMPANY, a corporation, Defendant, Respondent and Cross-Appellant.

No. 17496.

Supreme Court of Utah.

Aug. 27, 1982.

Beneficiary filed action for face amount of life policy. The Third District Court, Salt Lake County, David B. Dee, J., entered judgment for the insurer. Beneficiary appealed. The Supreme Court, Oaks, J., held that: (1) the district court did not err in concluding that a medical history form was "part of the policy" and admissible in evidence; (2) the insurer's affirmative defense that the insured misrepresented that he had never been treated for excessive use of alcohol was properly pleaded; (3) the fact that the affirmative defense referred only to "treatment * * * for alcoholism," did not render notice that "excessive use of alcohol" was in issue insufficient; and (4) that the insurer based its affirmative defense on one answer in the insured's medical history form did not preclude evidence relating to another answer on the same general issue.

Judgment affirmed.

1. Insurance ⇐271.2

In action by beneficiary for face amount of life policy, district court did not err in concluding that medical history of portion of application was "part of the policy" and admissible where there was no evidence to contradict insurer's testimony that it was standard procedure for insurer to attach copy of medical history and life application to each policy when it was issued, that there was no evidence that procedure was varied and medical history form stated that it would be part of application for policy. U.C.A. 1953, 31-19-7(1).

2. Pleading ⇐48

Fundamental purpose of liberalized pleading rules is to afford parties privilege of presenting whatever legitimate contentions they have pertaining to their dispute, subject only to requirement that their adversary have fair notice of nature and basis or grounds for claim and general indication of type of litigation involved. Rules Civ. Proc., Rules 8(a)(1), (b, c), (e)(1), 9(b).

3. Libel and Slander ⇐80

When pleader complains of conduct described by such general terms as "libel, intimidation, or false statements," allegation of the conclusion is not sufficient; pleading must describe nature or substance of acts or words complained of. Rules Civ. Proc., Rules 8(a)(1), (b, c), (e)(1), 9(b).

4. Fraud ⇐43

Requirement that circumstances constituting fraud be stated with particularity reaches all circumstances where pleader alleges the kind of misrepresentations, omissions or other deceptions covered by term "fraud" in its broadest dimension. Rules Civ.Proc., Rule 9(b).

5. Insurance ⇐640(2)

In action by beneficiary for face amount of life policy, affirmative defense which recited particular answer to question on application involving alcoholism and specifically alleged that answer was fraudulent or material to acceptance of risk or hazard assumed and that insurer would not have issued policy if true facts had been known was sufficiently pleaded to put in issue all statutory defenses of deception, including omission, incorrect statement and misrepresentation. Rules Civ.Proc., Rule 9(b); U.C.A. 1953, 31-19-8.

6. Insurance ⇐640(2)

In action by beneficiary for face amount of life policy, insurer's answer's reference to "treatment * * * for alcoholism" was sufficient and fair notice to beneficiary that general issue of treatment for "excessive use of alcohol" was in issue.

7. Insurance ⇐645(3)

In action by beneficiary for face amount of life policy, insurer's affirmative defense that insured made misrepresentation in connection with his answer as to whether he had ever received treatment for alcoholism did not preclude proof of misrepresentation in another answer on application for concerning excessive use of alcohol where the two questions involved different characterizations of same general course of conduct.

John L. McCoy, Salt Lake City, for plaintiff, appellant and cross-respondent.

Roger H. Bullock of Strong & Hanni, Salt Lake City, for defendant, respondent and cross-appellant.

OAKS, Justice:

This is an action by the beneficiary of life insurance against the insurer for the face amount of the policy. After the jury gave its verdict on special interrogatories, the court entered judgment for the defendant, no cause of action. Plaintiff's appeal presents a single issue having to do with an alleged misrepresentation the decedent-insured made on the "Medical History portion of Life Application" in applying for the policy. Plaintiff contends that this issue should not have been submitted to the jury (1) because under U.C.A., 1953, § 31-19-7(1), the Medical History form was not "part of the policy" and therefore was not "admissible in evidence in any action relative to such policy," and (2) because, in any case, the defendant insurer waived its right to rely on the medical form because its answer did not plead misrepresentation as an affirmative defense.[1]

The insurer issued a $38,000 policy of life insurance on plaintiff's husband in 1977. In 1979, he was killed in a head-on automobile collision under circumstances indicating that his intoxication was a principal cause of his death. The insurer denied plaintiff's claim on the basis "that there was a serious and material misrepresentation in obtaining the policy. . ." The insurer's letter explained: "We relied upon the representations made in the application and had we been aware of Mr. Williams' treatment for alcoholism with Dr. Jeppson and use of antabuse prior to our application, we would not have issued the policy." This action followed.

There was ample evidence at trial from which the jury could conclude that the decedent had a serious drinking problem and had been treated for excessive use of alcohol. Dr. Jeppson, his family physician, testified that he had treated decedent for alcoholism from 1974 to 1976, including prescriptions for antabuse, a drug used for patients otherwise unable to control their drinking. Dr. Jeppson also recommended consultation with a psychiatrist, Dr. Nielsen. Dr. Nielsen saw the decedent almost weekly through most of 1976 and several times in 1977 for treatment of various problems including drinking. While Dr. Nielsen concluded that the decedent was not an alcoholic, he did diagnose his problem as alcohol abuse, and encouraged him to continue taking antabuse. Dr. Nielsen testified that the decedent was a "binge" drinker, who drank impulsively without regard for the consequences. The blood alcohol level reported at the time of his death (.088%) indicated the ingestion of about five drinks in one hour's time.

In his signed "Life Application," dated Sept. 14, 1977, the insured answered the following question as noted:

10	Have you ever received treatment or joined an organization for alcoholism or drug habit?	yes	no
		—	x

In the "Medical Examiner's Report-Adult, Medical History Portion of Life Application," dated Sept. 29, 1977, which was also signed by the insured, he answered the following question as noted:

1. The defendant insurer has cross-appealed, contending that if the judgment is not affirmed, a new trial should be granted because of various errors at trial. In the view we take of the appeal, it is unnecessary for us to deal with this cross-appeal.

2. Have you ever been treated for or ever had any known indication of

* * *

1. Excessive use of alcohol, tobacco, or any habit-forming drugs? yes — no x

So far as material to this appeal, the special verdicts of the jury found as follows:

1. That the decedent's answer to question No. 10 on the Life Application *was not* an omission, an incorrect statement, or a misrepresentation;

2. That the decedent's answer to question No. 2.1. on the Medical History *was* an omission, an incorrect statement, and a misrepresentation; and

3. That although the answer to question 2.1. was not fraudulent, it was material to the acceptance of the risk and material to the hazard assumed by the insurer; and

4. That the insurer would not have issued the policy and would not have issued the policy at the same premium rate or in as large an amount if the true facts had been made known as required in the application.[2]

Consistent with these special verdicts, the district court entered judgment for the defendant insurer.

The jury's special verdict that there was no omission, inaccuracy, or misrepresentation on the question having to do with "alcoholism" disposes of that basis for the insurer's denial of plaintiff's claim. This appeal must therefore turn upon whether the jury could properly hear evidence and rely upon the decedent's false answer to question 2.1. of the Medical History that he had never been treated for excessive use of alcohol.

I.
WAS THE MEDICAL HISTORY PART OF THE POLICY?

Plaintiff first argues that the Medical History, which contained decedent's false denial that he had ever been treated for excessive use of alcohol, is not part of the policy and was therefore inadmissible in evidence under U.C.A., 1953, § 31–19–7(1), which reads as follows:

> No application for the issuance of any life or disability insurance policy or annuity contract shall be admissible in evidence in any action relative to such policy or contract, unless a true copy of such application was attached to, or otherwise made a part of the policy or contract when issued.

[1] Plaintiff challenges the district court's specific finding "under our statute and the business practices of the carrier that this [Medical History] is a portion of the policy, it's included in the policy." As a result of this finding, the court permitted the Medical History to be introduced in evidence and later allowed the jury to consider the insured's answer to question 2.1. in their deliberations. Plaintiff attacks the trial court's ruling as contrary to plaintiff's testimony that she did not remember finding a copy of the Medical History with the insurance policy in the family financial papers. In support of the court's conclusion, the insurer refers to testimony that it was standard procedure for the insurer to attach a copy of the Medical History and Life Application to each policy when it was issued, that there was no evidence that this procedure varied in this case, and that the Medical History form that was introduced in evidence was in the insurer's file. In addition, the insurer points to the following language that appears just above the insured's signature on the Medical History: "this Medical History shall be a part of the application for life insurance on my life."

On appeal, the record is reviewed in the light most favorable to the findings and action of the trial court, which are entitled to a presumption of validity and will not be disturbed if they are supported by substantial, competent evidence. *Search v. Union Pacific Railroad Co.*, 649 P.2d 48 (1982);

2. These special interrogatories treat the bases for denial of recovery under U.C.A., 1953, § 31–19–8, discussed in Part II, *infra*

Litho Sales, Inc. v. Cutrubus, Utah, 636 P.2d 487 (1981); *Car Doctor, Inc. v. Belmont,* Utah, 635 P.2d 82 (1981); *Hutcheson v. Gleave,* Utah, 632 P.2d 815 (1981). The evidence reviewed above provides the required support. We therefore decline to overrule the district court on this question.

Plaintiff cites numerous cases making an insurance application inadmissible if it is not physically "attached to" or "endorsed upon" the policy of insurance. *E.g., Johnson v. Des Moines Life Association,* 105 Iowa 273, 75 N.W. 101 (1898); *Blatz v. Travelers Insurance Co.,* 272 App.Div. 9, 68 N.Y.S.2d 801 (1947); *Sandberg v. Metropolitan Life Insurance Co.,* 342 Pa. 326, 20 A.2d 230 (1941). *Also see Annot.,* 18 A.L.R.3d 760, 766–67 (1968), and cases cited therein, such as *Economy Fire & Casualty Co. v. Thornsberry,* 66 Ill.App.3d 225, 23 Ill.Dec. 13, 383 N.E.2d 780 (1978). But an examination of these cases reveals that with but one exception, which is not in point here,[3] all were based upon statutes that made the application form inadmissible if it was not physically attached to or endorsed upon the policy. In contrast, the inadmissibility dictated by § 31–19–7(1) of our statute does not apply where the application form is *either* "attached to, or *otherwise made a part of the policy* . . . ." (Emphasis added.) The district court's finding and conclusion that the Medical History was "included in" and "a portion of" the policy obviously relied on the emphasized language. Hence, plaintiff's cases, which apply statutes with more restrictive requirements, are distinguishable.

We therefore conclude that § 31–19–7(1) did not make the Medical History inadmissible in this action on the policy.[4]

II.

WAS THE DEFENSE PROPERLY PLEADED?

Second, plaintiff contends that the insured's misrepresentation that he had never been treated for excessive use of alcohol should not have been submitted to the jury because that affirmative defense was not properly pleaded under Utah R.Civ.P. 8(c), and was therefore waived under Rule 12(h). *Pratt v. Board of Education,* Utah, 564 P.2d 294, 298 (1977).

This issue turns on how specifically a defendant must plead an affirmative defense under U.C.A., 1953, § 31–19–8. That statute, on which the insurer relies, provides that all statements in any application for an insurance policy shall be deemed to be representations, and that omissions, incorrect statements, or misrepresentations "shall not prevent a recovery under the policy" unless they are (a) fraudulent, or (b) material either to the acceptance of the risk or to the hazard insured, or (c) the insurer would not have issued the policy if it had known the true facts.

The insurer's answer contained the following paragraph, whose adequacy is at issue here:

> As a separate affirmative defense, defendant alleges that on or about September 14, 1977, Charles Miller Williams completed a written application for said life insurance policy in part as follows
>
> 10 Have you ever received treatment or joined an organization for alcoholism or drug habit? yes — no X
>
> Defendant further alleges that said answer was fraudulent or material to ac-

3. *Lundmark v Mutual of Omaha Ins Co*, 80 Wash.2d 804, 498 P 2d 867 (1972), involved a statute identical to Utah's But the additional document that occasioned the holding of inadmissibility in that case was an inter-office memorandum prepared by the insurer after the application was submitted. That memorandum was not signed by the insured In addition, the case contains no discussion of the effect of the "otherwise made part of" language discussed above.

4. In the alternative, plaintiff contends in her reply brief that the district court's conclusion that the Medical History form was part of the life insurance policy and could therefore be admitted in evidence erroneously invaded the fact finding province of the jury *Fg*, 17A C J S *Contracts* § 616 p 1249 (1963) We decline to consider this argument, because it is raised for the first time on appeal *Bekins Bar V Ranch v Beryl Baptist Church,* Utah, 642 P 2d 371 (1982), *Collier v Frerichs,* Utah, 626 P 2d 476 (1981)

> ceptance of the risk or to the hazard assumed by defendant, or defendant in good faith either would not have issued the policy or would not have issued it at the same premium rate if the true facts had been made known as required by the application.

Plaintiff contends that this affirmative defense is insufficient in three respects: (1) it refers only to "fraudulent" answers, whereas the jury found no fraud; (2) it refers only to "treatment . for alcoholism," whereas the jury found no omission, incorrect statement, or misrepresentation in the insured's answer respecting alcoholism; and (3) it refers to an alleged false answer on question 10 on the application, but it makes no reference to question 2.1. on the Medical History.

Plaintiff's arguments raise serious questions about the adequacy of defendant's pleadings. Before we address these questions, it will be helpful to review our rules and decisions governing the pleading of affirmative defenses.

Rule 8(a)(1) of the Rules of Civil Procedure, adopted in 1950, requires that a pleading set forth "a short and plain statement of the claim showing that the pleader is entitled to relief ..." Defenses must be stated "in short and plain terms " Rule 8(b). "Each averment of a pleading shall be simple, concise and direct." Rule 8(e)(1). Rule 8(c) specifies that "[i]n pleading to a preceding pleading, a party shall set forth affirmatively .. fraud .. and any other matter constituting an avoidance or affirmative defense." Finally, Rule 9(b) states that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."

Our decisions have construed these requirements. *Burr v. Childs,* 1 Utah 2d 199, 204, 265 P.2d 383, 387 (1953), unanimously approved a pleading the Court characterized as "a crisp statement of ultimate facts." That opinion quotes with approval the following passage from *Hickman v. Taylor,* 329 U.S. 495, 500–01, 67 S.Ct. 385, 388–389, 91 L.Ed. 451 (1947), concerning the Federal Rules, from which our Rules had been taken:

> Under the prior federal practice, the pretrial functions of notice-giving, issue-formulation and fact-revelation were performed primarily and inadequately by the pleadings. Inquiry into the issues and the facts before trial was narrowly confined and was often cumbersome in method. The new rules, however, restrict the pleadings to the task of general notice-giving and invest the deposition-discovery process with a vital role in the preparation for trial.

Blackham v. Snelgrove, 3 Utah 2d 157, 160, 280 P.2d 453, 455 (1955), quoted this same language and also referred approvingly to other authorities, as follows:

> Thus, it can very often be found stated in these cases that a complaint is required only to " * * * give the opposing party fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved."

The leading statement of these pleading principles in the context of an affirmative defense is Justice Crockett's much-cited opinion for the Court in *Cheney v. Rucker,* 14 Utah 2d 205, 211, 381 P.2d 86, 91 (1963), which held admissible a supplementary agreement reducing the compensation fixed in a real estate contract notwithstanding it had not been specifically pleaded as an affirmative defense. After explaining that the purpose of the Rule 8(c) requirement that affirmative defenses be pleaded was "to have the issues to be tried clearly framed," the Court added that this was only one of the Rules:

> They must all be looked to in the light of their even more *fundamental purpose of liberalizing both pleading and procedure to the end that the parties are afforded the privilege of presenting whatever legitimate contentions they have pertaining to their dispute. What they are entitled to is notice of the issues raised and an opportunity to meet them. When this is accomplished, that is all that is required.* Our rules provide for liberality to allow examination into and settlement of all

> issues bearing upon the controversy, but safeguard the rights of the other party to have a reasonable time to meet a new issue if he so requests. [Emphasis added.]

The foregoing passage was quoted with approval by a unanimous Court in *Eie v. St. Benedict's Hospital*, Utah, 638 P.2d 1190, 1193–94 (1981) (answer referring generally to fraudulent inducement, estoppel, and breach by plaintiffs held sufficient pleading to raise issue that parties' agreement not integrated and therefore subject to modification by contemporaneous oral communications).

[2] It is evident from these statements that the fundamental purpose of our liberalized pleading rules is to afford parties "the privilege of presenting whatever legitimate contentions they have pertaining to their dispute," *Cheney v. Rucker, supra*, subject only to the requirement that their adversary have "fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved." *Blackham v. Snelgrove, supra.* The functions of issue-formulation and fact-revelation are appropriately left to the deposition-discovery process. The rules "allow examination into and settlement of all issues bearing upon the controversy," *Cheney v. Rucker, supra*, with latitude for proof that extends beyond the pleadings, where appropriate. Rule 15(b). It also appears from the cited decisions that these principles are applied with great liberality in sustaining the sufficiency of allegations stating a cause of action or an affirmative defense.

[3] The application of these principles to specific pleadings is also instructive. An allegation of "certain derogatory and libelous statements" is insufficient; a complaint for defamation must set forth "the language complained of in *words* or *words* to that effect " *Dennett v. Smith*, 21 Utah 2d 368, 369, 445 P.2d 983, 984 (1968). An allegation that the defendant conspired to "annoy, threaten and intimidate the plaintiff" is insufficient when it does not state "the nature or substance of the acts allegedly committed by defendants . . " *Utah Steel & Iron Co. v. Bosch*, 25 Utah 2d 85, 86, 87, 475 P.2d 1019, 1020 (1970). Allegations which contained merely broad and general statements that a "false affidavit and false pleadings were filed" but which contained "no allegation whatever of the contents, nature or substance" of any such false statements are insufficient. *Heathman v. Fabian & Clendenin*, 14 Utah 2d 60, 62, 377 P 2d 189, 190 (1962). It appears from these precedents that when the pleader complains of conduct described by such general terms as libel, intimidation, or false statements, the allegation of the conclusion is not sufficient; the pleading must describe the nature or substance of the acts or words complained of.

The same is true of fraud. Rule 9(b) specifies that "the circumstances constituting fraud shall be stated with particularity." In *Heathman v. Hatch*, 13 Utah 2d 266, 267–68, 372 P 2d 990, 991 (1962), a complaint charging a lawyer with "fraud," "conspiracy," and "negligence" was dismissed for failure to state a cause of action. In affirming unanimously, this Court stated:

> It is to be noted that the terms "fraud," "conspiracy" and "negligence" are but general accusations in the nature of conclusions of the pleader. They will not stand up against a motion to dismiss on that ground. *The basic facts must be set forth with sufficient particularity to show what facts are claimed to constitute such charges.* [Emphasis added.]

Similarly, in *Shayne v Stanley & Sons, Inc.*, Utah, 605 P.2d 775, 776 (1980), the Court affirmed the granting of summary judgment for defendants on a complaint charging "fraud" where plaintiff admitted in answering defendant's interrogatories that he could not designate any specific fraud on the part of defendants, but had brought his action "to determine what acts were instigated by defendants to deceive plaintiff."

Against the background of the foregoing principles, we now examine plaintiff's arguments on the insufficiency of defendant's pleading of its affirmative defense.

1. *Fraud vs. omission, incorrect statement or misrepresentation.*

First, plaintiff contends that the affirmative defense is insufficient because it only alleges that the "answer was fraudulent," whereas the jury found no fraud. In contrast, the statutory terms—omission, incorrect statement, and misrepresentation—which the jury did find, are not alleged.

[4] "Fraud" or "fraudulent" are terms of uncertain meaning. They are conclusions that must be fleshed out by elaboration and by consideration of the context in which they are used. This is why Rule 9(b) requires that the circumstances constituting fraud "shall be stated with particularity," a requirement we have construed to require allegation of the substance of the acts constituting the alleged wrong. The Rule 9(b) requirement should not be understood as limited to allegations of common-law fraud. The purpose of that requirement dictates that it reach all circumstances where the pleader alleges the kind of misrepresentations, omissions, or other deceptions covered by the term "fraud" in its broadest dimension. Consequently, if the pleading had merely alleged that the insured had given "fraudulent" or "deceptive" or "misrepresenting" answers, it would have been insufficient.

[5] In contrast, this affirmative defense recited a particular answer to a question involving alcoholism, and specifically alleged that this answer was fraudulent or material to the acceptance of the risk or the hazard assumed or that the defendant would not have issued the policy (at least not at that rate) "if the true facts had been made known ...." In the context of the statute paraphrased here, § 31–19–8, this allegation was sufficient and fair notice to put in issue all of the statutory defenses of deception, including the omission, incorrect statement, and misrepresentation ultimately found by the jury.[5]

2. *Alcoholism vs. excessive use of alcohol.*

[6] Plaintiff next relies on the fact that the affirmative defense refers only to "treatment for alcoholism," whereas the jury found no deception in the insured's answer on alcoholism. In contrast, the pleading makes no reference to the insured's denial that he had been "treated for excessive use of alcohol," which the jury did find constituted an omission, an incorrect statement, and a misrepresentation.

We agree with the district court that the answer's reference to "treatment ... for alcoholism" was sufficient and fair notice to plaintiff that the general subject of treatment for "excessive use of alcohol" was in issue. Pleadings need not be as precisely phrased or as rigorously construed as special interrogatories. The fact that the jury was called upon to distinguish between the truthfulness of these two terms does not mean that the two must be distinguished for purposes of the general notice required to be communicated in the pleadings.

In the course of the trial, both parties elicited evidence or took positions to the effect that there are no concrete definitions of "alcoholic" or "alcoholism."[6] In view of the general nature of the term used in the pleadings, and in view of the liberalized pleading rules discussed earlier, we think the district court was clearly correct in ruling that defendant's pleading of misrepresentations about "alcoholism" permitted the introduction of evidence on misrepresenta-

5. *Pratt v. Board of Education, supra,* is not to the contrary. That case involved the effect of a defendant's omitting to allege any affirmative defense (including, particularly, plaintiff's failure to mitigate damages). In this case, defendant clearly alleged an affirmative defense, and the only issue is how broadly its allegation is to be construed.

6. The Uniform Alcoholism and Intoxication Treatment Act, § 2(1), 9 Uniform Laws Annotated 63 (1979), adopted in thirteen states, includes in its definition of "alcoholic" a "person who habitually lacks self-control as to the use of alcoholic beverages." Utah statutes are not uniform in their use of the terms "alcoholism" or "alcoholics." *E.g.*, compare U.C.A., 1953, § 63–43–3(2) (apparently broad meaning) and § 78–4–7(j) (1981 Supp.) (less inclusive meaning).

tions concerning "excessive use of alcohol." The trial court followed the proper procedure in leaving the meaning of these terms and the question of misrepresentation to the jury. This is especially true since questions of material and prejudicial variance between pleadings and proof, 71 C.J.S. *Pleading* §§ 531–35 (1951), are peculiarly within the province of the trial court, and will be reversed only for abuse of discretion.

3. *Question 10 on the Life Application vs. Question 2.1. on the Medical History.*

[7] Finally, plaintiff argues that the insured's statement that defeated recovery on the policy (Medical History question 2.1. on excessive use of alcohol) was not alleged in the answer, whereas the jury found that the statement alleged in the answer (Life Application question 10 on alcoholism) was not a misrepresentation.

It is evident from the earlier discussion that if the answer had alleged only that the insured's application for the policy misrepresented the facts concerning his treatment for "alcoholism" this would have been sufficiently specific to permit proof of misrepresentations concerning treatment for "excessive use of alcohol." But when the answer quotes a specific answer to a particular question on one form, does this preclude proof of another answer to a different question on a different form, when both answers are part of the application? In other words, where the pleadings are more specific than the rules require, must the latitude of proof be more narrowly confined than the rules contemplate?

No rule of law can answer that question. It is a matter to be resolved by the trial court under the groundrules of "fair notice" of the basis of the claim and opportunity to adjudicate, *Cheney v. Rucker, supra; Blackham v. Snelgrove, supra,* and under the more specific requirement that a charge of fraud must be supported by "sufficient particularity to show what facts are claimed to constitute such charges." *Heathman v. Hatch,* quoted *supra.*

Here, in response to plaintiff's vigorous and timely claims of prejudice in the admission of the Medical History form, the trial court found that there was no prejudice. For the following reasons, we find no abuse of discretion in that finding and that decision.

First, the question quoted in the answer and the question contained in the Medical History form were different characterizations of the same general course of conduct, alcohol abuse. Consequently, this is not a circumstance where an adversary would suffer prejudice as a result of preparing to litigate the factual circumstance alleged in the pleadings, only to face proof of another circumstance at trial. Defendant's pleading provided plaintiff with adequate notice of "what facts [were] claimed to constitute" its defense. The law requires no more.

Second, the defendant's intention to rely at least in part on the insured's answer on the Medical History form was also evident during discovery. Defendant provided plaintiff a copy of the Medical History form over seven months before trial. At about that same time, during defendant's taking of plaintiff's deposition, plaintiff was shown the Medical History form and questioned in detail about the insured's answer to question 2.1. on excessive use of alcohol.

For the reasons discussed above, we conclude that the affirmative defense of the insured's misrepresentation was properly pleaded and that the evidence thereof was properly admitted. The judgment on the verdict for defendant is therefore affirmed. Costs to respondent.

HALL, C.J., and STEWART, HOWE and DURHAM, JJ., concur.

22 Utah 2d 207

E. N. YOUNGREN and Jerry Snider, a co-partnership, dba Youngren & Snider, Plaintiffs and Respondents,

v.

JOHN W. LLOYD CONSTRUCTION COMPANY, Inc., a Utah corporation, Defendant and Appellant.

No. 11224.

Supreme Court of Utah.

Feb. 27, 1969.

Suit to recover for services rendered to the defendant in crushing aggregate for use in highway construction. The Fourth District Court, Wasatch County, Allen B. Sorensen, J., entered judgment for plaintiff and defendant appealed. The Supreme Court, Crockett, C. J., held that where issue as to whether defendant, sued for plaintiff's services in crushing aggregate for use in highway construction, had been charged with too much aggregate because of moisture content had not been framed in either the pleadings or the pretrial order, and contract did not refer to moisture content, trial court's refusal to permit defendant to raise issue in absence of showing that water had been added to aggregate was not unreasonable or unjust.

Affirmed.

1. Continuance ⇐49

Where there had already been considerable delay in getting suit for services to trial, and on ample notice to parties plaintiffs and witnesses had traveled considerable distance and were in court and ready to proceed, trial court's refusal of defendant's request to amend pleadings and to have a continuance, except upon condition that he pay $200, was not unreasonable or unfair.

2. Evidence ⇐417(9)
Pleading ⇐380
Trial ⇐9(1)

Where issue as to whether defendant, sued for plaintiff's services in crushing aggregate for use in highway construction had been charged with too much aggregate because of moisture content had not been framed in either the pleadings or the pretrial order, and contract did not refer to moisture content, trial court's refusal to permit defendant to raise issue in absence of showing that water had been added to aggregate was not unreasonable or unjust.

3. Evidence ⇐397(1)

When parties have negotiated on a subject and have thereafter entered into written contract, it should be assumed that prior negotiations are fused into the contract so that it represents their full agreement with respect thereto, and extraneous evidence should ordinarily not be permitted to add to, subtract from, vary, or contradict it.

4. Evidence ⇐445(1)

Fact that parties have a written contract on a subject does not prevent them from entering into other agreements relating to the same general subject matter.

5. Appeal and Error ⇐991

Whether parties who negotiated written contract for furnishing of aggregate for use in highway construction had a separate agreement pursuant to which plaintiff was to perform and be paid for other services was for trial court to determine.

6. Contracts ⇐350(1)

Evidence supported finding that in addition to written contract pursuant to which plaintiff was to furnish aggregate for highway construction parties had separate agreement pursuant to which plaintiff was to perform and be paid for other services.

John L. Chidester, Heber, for appellant.

Oscar W. McConkie, Jr., of Kirton & McConkie, Salt Lake City, for respondents.

CROCKETT, Chief Justice:

Plaintiffs Youngren and Snider sued to recover for services rendered to the defendant, Lloyd Construction Company, in crushing aggregate (rock and gravel) for use in highway construction in Wasatch

County After a plenary trial the district court granted judgment for the plaintiffs from which defendant appeals

The findings of the trial court include the following (1) That under a written contract dated September 8, 1965, the plaintiffs were to furnish defendant certain quantities and types of crushed gravel valued at $20,000, based on prices set forth in the contract, for which the defendant was to convey to the plaintiffs a D8 13A caterpillar tractor, valued at $10,000, and $10,000 in cash. (2) That the plaintiffs performed by delivering and/or stockpiling ready for pickup by the defendant crushed aggregate worth in excess of the $20,000 (3) That the defendant has paid only the sum of $1992 81 (4) That in addition to the above, the defendant requested the plaintiffs to perform certain extra work, outside the written contract, of the reasonable value of $2968.37.

Based upon those findings the court gave plaintiffs judgment for $8007 19 under the contract, $2968.37 for other services requested and rendered, for a transfer of title to the D8 13A caterpillar tractor, and for the sum of $1200 pursuant to the provision in the contract for reasonable attorney's fees for enforcement.

[1] The defendant makes a general accusation of unfairness against the trial court in refusing, on the day set for trial, his request to amend his pleadings and to have a continuance, except upon condition that he pay $200. The facts are that there had already been considerable delay in getting the case trial, and that on ample notice to the parties, the plaintiffs and their witnesses had traveled a considerable distance to Heber City and were in court and ready to proceed. The judge emphasized the desirability of avoiding further delay, and made the order above stated. In response, defendant's counsel indicated that he elected to go on with the trial Except for a statement that the order was arbitrary and unreasonable, and that he did not want to be bound by the pleadings, the record does not disclose just what, if any, disadvantage the defendant suffered because of proceeding to trial Under the circumstances shown we are not convinced that the order was unreasonable or that the defendant was treated unfairly.

[2] During the trial the defendant attempted to raise an issue that, due to the moisture content, it had been charged with too much aggregate Evidence concerning that issue was excluded by the trial court on the ground that it had not been framed in either the pleadings or the pretrial order, and more important, because it was not referred to in the contract He remarked on the fact that the contract said nothing about moisture content, but "* * * just says so much per ton It doesn't say net dry ton, or anything else" The parties were well acquainted with this particular gravel pit and they certainly must have known of the condition generally of the materials which came from it The trial court proceeded on the assumption that any omission should be construed against the defendant, whose attorney drew the contract,[1] and that, consequently, it should have been covered if there had been any concern about the matter

The court further observed

> I have ruled, in order to make this case move forward, that I am not going to consider, unless, of course, you can demonstrate when it went across the scales it was slopped with many many gallons of water—if you can establish that, that is another matter—but as for run of the mill gravel from a pit with the usual ordinary water content I am not going to consider it Rightly or wrongly I have ruled on it on the principles of the construction of the contract. So the objection is sustained.

We see nothing unreasonable or unjust in the views thus expressed by the trial court, nor with his procedure in determining the amount of the aggregate delivered on the

1. See Continental Bank & Trust Co v Bybee, 6 Utah 2d 98, 306 P 2d 773 (1957).

basis of what the evidence shows to be a reasonable "conversion factor" of 140 pounds weight per cubic foot.

[3] Defendant urges that all of the work involved should have been considered as included in the written contract; and that the trial court transgressed the parol evidence rule in allowing testimony about the extra work and allowing compensation therefor. In that regard we acknowledge agreement with these principles: When parties have negotiated on a subject and have thereafter entered into a written contract, it should be assumed that their prior negotiations are fused into the contract so that it represents their full agreement with respect thereto; and that, consequently, after its due execution, extraneous evidence should ordinarily not be permitted to add to, subtract from, vary, or contradict it.[2]

[4–6] On this subject it is appropriate to here note a previous statement of this court, that the parol evidence rule, "while simple to state, is often confusing in its application, due largely to misunderstanding of its purposes; that is, attempting to apply a rule rather than a reason."[3] Consistent with that idea that the rule should not be regarded as applicable in rigidity and without exception, but in the light of reason under the particular circumstances, is this thought pertinent here: the fact that the parties have a written contract on a subject does not prevent them from entering into other agreements relating to the same general subject matter. Whether there was such a separate agreement was for the trial court to determine. The evidence justifies his finding that, separate from the rock crushing stipulated in the written contract, the parties agreed upon other services in stripping and stockpiling work to be performed by the plaintiffs and paid for by defendant. This was admitted by Mr. John W. Lloyd himself on cross-examination and without objection. The trial court properly made an award for the reasonable value of such services.[4]

Other points raised by the defendant do not impress us as warranting discussion. It is sufficient to say that in our opinion none of the matters complained of, either singly or cumulatively, so prejudiced the defendant as to deprive it of a fair trial; and that the findings and judgment are amply supported by the evidence.

Affirmed. Costs to plaintiffs (respondents).

CALLISTER, TUCKETT, HENRIOD, and ELLETT, JJ., concur.

2. 32A, C.J.S. Evidence § 851, p. 211; 30 Am.Jur.2d 149.

3. Garrett v. Ellison, 93 Utah 184, 188, 72 P.2d 449, 451, 129 A.L.R. 666 (1937).

4. Ross v. Leftwich, 14 Utah 2d 71, 377 P.2d 495 (1963).

22 Utah 2d 211

The STATE of Utah, Plaintiff and Respondent,

v.

Don C. FOX, Defendant and Appellant.

No. 11236.

Supreme Court of Utah.

Feb. 20, 1969.

Prosecution resulting in a fictitious check conviction by virtue of judgment of the Third District Court, Salt Lake County, Merrill C. Faux, J., and the defendant appealed. The Supreme Court, Henriod, J., held that where check was written on paper imprinted with purported name of a local existing company, thereby at least impliedly representing company to be the payor and defendant who passed check made no claim to be person named as payee, charging defendant with violation of statute making it a felony to falsely make any check with intent to defraud was proper,